

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RANDLE GRIFFIN,

Plaintiff,

HONORABLE JOHN CORBETT O'MEARA

v.

No. 11-14876

LOUIS CONDON, et al.,

Defendants.

JURY TRIAL - VOLUME 4

Monday, January 23, 2017

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- - -

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1 Detroit, Michigan

3 9:09 a.m.

4

9 **MR. MOODY:** Good morning, Your Honor. Nolan Moody on
10 behalf of the Plaintiff, Randle Griffin. To my right is
11 Brandon Hubbard, Wade Fink, and Jessica Russell, also on behalf
12 of plaintiff.

13 MR. SCHNEIDER: Good morning, Your Honor.

14 Cliff Schneider on behalf of Defendants Condon, Downard and
15 McMurtrie.

18 I have a response to the plaintiff's pocket brief, which
19 is cogent and well written but for a variety of reasons will be
20 denied.

21 And we have jury instructions, which you should have on
22 both plaintiff and defendants' side in your position, and we
23 have one proposed addition or amendment, I guess, to what we
24 have in the way of jury instructions, which, as near as I can
25 tell, adds the age of one of the nonparties, and I'm not sure I

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1 understand exactly why that's important and, if it's important,
2 why it wasn't added earlier when the rules say that jury
3 instructions, joint jury instructions will be in fact given to
4 the Court by the time the trial starts, which is a little late,
5 but I -- in any event, we're not going to add that to the jury
6 instructions, even though it was interesting and peculiar to me
7 anyway at least, all of a sudden both parties realize they
8 would benefit from the addition of the age of one of the
9 nonparties.

10 Is there something else? We have a witness still on
11 direct, as I recall. There he is, Mr. Condon. Yes.

12 **MR. HUBBARD:** Your Honor, Mr. Condon is actually
13 subject to cross.

14 **THE COURT:** But there apparently was an assertion by
15 Mr. Schneider that he had a couple more questions on direct.

16 **MR. SCHNEIDER:** I do, Your Honor.

17 **THE COURT:** Is there anything wrong with that?

18 **MR. HUBBARD:** Respectfully, there is. We believe
19 that the couple of other questions are going to go to
20 two additional "rebuttal exhibits," Your Honor. We challenge
21 the admission of those two rebuttal exhibits for reasons that I
22 can explain to the Court, and respectfully we ask that
23 Mr. Condon be immediately subject to cross-examination and that
24 those supposed rebuttal exhibits not be brought into this case
25 as evidence.

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1 We did just this morning, I think within the last ten
2 minutes, plus or minus, depending upon how quick my assistant
3 is, file a quick three-page brief regarding why those
4 two exhibits should be excluded. I do have a copy of that
5 brief here with me this morning, and if I may approach, I would
6 be pleased to give it to the Court.

7 **THE COURT:** Well, one of the things about briefs that
8 I picked up someplace along the line in 33 years is they are
9 good if the person who is going to read them and resolve things
10 on that basis gets them in advance and not submitted it -- I'm
11 being harsh. This is a little late. I don't -- you are saying
12 that it's inconvenient and it's inconvenient to the point that
13 it's objectionable.

14 **MR. HUBBARD:** It is, Your Honor, and I have a good
15 answer as to why we filed it this morning. The answer to that
16 inquiry is because we didn't actually get notified from
17 defendants' counsel until 4:25 p.m. on Saturday that he was
18 going to seek to introduce two new exhibits that were not on
19 the final pretrial order. In fact, the exhibits have been in
20 their possession since at least 2011.

21 **THE COURT:** And what does it do for you, ultimately
22 what the jury sees or hears that they -- we can't in advance
23 have the attempt by the defendants to make use of these? It
24 might be objected, they might be denied, but what is there that
25 you are trying to get hold of?

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1 **MR. HUBBARD:** Well, frankly, Judge, the exhibits are
2 prejudicial to our position because, one, it's trial by
3 surprise. The defendants have been in possession of these
4 two particular exhibits that address the ongoing laundry issue,
5 I'll refer to it as.

6 The Court will recall that Larry Anthony, one of the
7 previously incarcerated prisoners at the Gus Harrison Facility,
8 testified that he overheard the ongoing conversation between
9 the three defendants while he was undergoing laundry duties.
10 Now the defendants seek to introduce on the last day of trial
11 two exhibits that bear upon when in fact laundry duties can and
12 cannot be undertaken at Gus Harrison Facility.

13 The problem with this is two fold. One, we have already
14 submitted an affidavit from Larry Anthony back in October of
15 2015 in opposition to their motion for summary judgment, and
16 that affidavit explicitly stated that in fact he was undergoing
17 laundry duties at the time that he overheard the alleged
18 conversation regarding the conspiracy undertaken by the
19 defendants. So they have known for more than a year that the
20 laundry issue was going to be an issue in this trial and that
21 Mr. Anthony was going to testify to it.

22 Now, on Saturday they proposed to admit two "rebuttal
23 exhibits," but it's not rebuttal at all. They have known about
24 it all along. Larry Anthony's testimony to the defendants is
25 no surprise, and this is what's worse.

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1 These exhibits aren't new to the defendants. They have
2 known about these exhibits. One is dated in 2011, and the
3 other in 2009. This case was filed in 2011. Here we are
4 six years later. They have been sitting on the exhibits for
5 six years. They have known about Larry Anthony's testimony for
6 over a year. Why didn't they bring it up at the time that
7 Larry Anthony testified?

8 **THE COURT:** I don't know, but certainly things like
9 this happen in all trials or at least most, and it is the
10 plaintiff's position here that they should not be allowed to go
11 ahead because if they do they will be able to get something in
12 that they shouldn't have in the record and shouldn't let the
13 jury hear it. You may be right about that part. You certainly
14 are making persuasive points by indicating that these things
15 were known to and in the possession of the defendants for a
16 long period of time. And I think I will let Mr. Schneider
17 argue. He's been standing there patiently.

18 **MR. SCHNEIDER:** Thank you, Your Honor. After hearing
19 Mr. Anthony's testimony where he for the first time ever gave a
20 time that this alleged conversation he witnessed occurred, RUM
21 Condon went back to work on Friday and he pulled the old
22 schedules for the laundry room, which show that the laundry
23 room was closed at the time that Mr. Anthony on the stand said
24 he was working and heard this conversation.

25 So, yes, he submitted an affidavit previously, Mr. Anthony
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1 did, saying he was working in laundry and witnessed this
2 conversation, but on the stand is the first time where he's put
3 a time to that. Now that we have a time, RUM Condon took it on
4 himself to go find the document that proves, no, he could not
5 have been working at that time.

6 **MR. HUBBARD:** That is absolutely not true.

7 **THE COURT:** All right. I'm not going to spend a lot
8 of time having you assert and disassert things that one side or
9 another says. I think, although it may be important for the
10 moment with the parties, that we're talking about something
11 that is not a key to who prevails in this case, at least in my
12 mind. I'm going to I guess grant the motion of the plaintiff
13 and say that the defense presentation as proposed is untimely
14 and is unfair to the other side, and we'll go on from there.

15 Do you still have things to say?

16 **MR. SCHNEIDER:** Yes, Your Honor.

17 **THE COURT:** To Mr. Condon?

18 **MR. SCHNEIDER:** Yes, Your Honor.

19 **THE COURT:** Not those things though?

20 **MR. SCHNEIDER:** Not those exhibits, correct, other
21 things, Your Honor.

22 **THE COURT:** What do you have to say about that?

23 **MR. HUBBARD:** Well, frankly, Your Honor, Counsel, and
24 I think the Court will recall, that when we concluded on
25 Thursday Mr. Schneider had rested with the direct examination

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1 of Mr. Condon, and in fact my colleague, Mr. Moody, was up
2 there at the podium and expressed his concern about his ability
3 to get through cross-examination within a matter of
4 seven minutes.

5 Our proposal is that we go directly into cross. The fact
6 that Mr. Schneider may have thought of additional questions
7 over the weekend that he desires to ask of his witness is no
8 reason to change the status quo as to where we were at in trial
9 on Thursday. So --

10 **THE COURT:** Well, it might be, and all of these
11 technical give-ups from one side or another shouldn't control
12 the substance of what goes on before the jury.

13 You may ask further questions, Mr. Schneider, and do so in
14 consideration of the fact that I have ruled on the things that
15 were concerning the plaintiff.

16 **MR. SCHNEIDER:** Yes, Your Honor.

17 **MR. HUBBARD:** Thank you, Judge.

18 **THE COURT:** We're still, we're still in direct
19 apparently, right?

20 **MR. SCHNEIDER:** Yes, Your Honor.

21 **THE COURT:** Put your witness on, and we'll get the
22 jury in here.

23 **MR. SCHNEIDER:** Thank you, Your Honor.

24 **THE COURT:** And you are still under oath, as I'm sure
25 you know.

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1 **THE CLERK:** All rise for the jury.

2 (Jury in at 9:21 a.m.)

3 **THE COURT:** Members of the jury, please be seated.

4 Thank you for being here and being here promptly, more promptly
5 than we were because we had to talk about a few things before
6 we got you in here, but I was -- frankly, I don't know what I
7 can do about it. As I sometimes say, there aren't any prizes
8 or monetary awards for jurors who are on time, but you've been
9 on time pretty much all the time and you're really on time with
10 bad weather today and thank you for that.

11 We are still in the process of direct examination of
12 Defendant Condon, and you may, Mr. Schneider, continue.

13 **MR. SCHNEIDER:** Thank you, Your Honor.

14 - - -

15 (9:22 a.m.)

16 **DIRECT EXAMINATION CONTINUED**

17 (Direct Examination began on Thursday, January 19, 2017)

18 **BY MR. SCHNEIDER:**

19 **Q.** Okay. ARUS Condon, the incident with Prisoner Bryant
20 where he got all the tickets?

21 **A.** Yes.

22 **Q.** What was the date of that?

23 **A.** That was January 26th of '11.

24 **Q.** Okay. And how long after that did you have the grievance
25 interview with the Assistant Deputy Warden?

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1 **A.** Approximately 10 days later.

2 **Q.** All right. Those January 26 incidents, do you recall what
3 time that was going on?

4 **A.** Yes, it was the later part of first shift. Started at
5 roughly, a little bit after 1300, which would be one o'clock.

6 **Q.** Okay. And then after the grievance interview with the ADW
7 you said he cleared you on the grievance, correct?

8 **A.** Correct.

9 **Q.** And did Prisoner Bryant appeal that?

10 **A.** No.

11 **Q.** During this incident was the unit locked down at all?

12 **A.** During the beginning of it it was opened up. There was
13 actually three separate incidents, incidences, but the latter
14 part, the final creating a disturbance, the unit was locked
15 down by the officers and then locked down as a matter of time
16 for shift change.

17 **Q.** What does that mean when the unit is locked down?

18 **A.** For shift change or for the creating of a disturbance?

19 **Q.** For a disturbance.

20 **A.** In this specific incidence a prisoner was on base creating
21 a bunch of attention by his actions. The officers secured the
22 activity room doors because the numerous prisoners were
23 gathering up against the glass. Prisoners were coming off of
24 the wings and looking out their cell doors in the wings to see
25 what was going on. So the officers locked down the unit,

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1 secured the activity room doors, had all the prisoners return
2 to their cells because of what was going on.

3 **Q.** Okay. The ombudsman's analyst who was here in court,
4 Ms. Zimbelman, had you ever seen her before?

5 **A.** No.

6 **Q.** The ARUS office where she may have met with Prisoner
7 Bryant --

8 **A.** Yes.

9 **Q.** -- how far is that from where your office was?

10 **A.** 36 feet.

11 **Q.** You measured that this weekend?

12 **A.** I had maintenance staff come in because we don't have
13 access to tape measures, but after you mentioned it, I had
14 maintenance staff come in and it was actually 36 feet.

15 **Q.** All right. You testified on Thursday that the laundry
16 room was closed during that part of the day when the
17 conversation was allegedly overheard, correct?

18 **A.** Correct.

19 **Q.** How far is the laundry room from the officers' desk?

20 **A.** 27 feet. There is also a cement pillar similar to what I
21 have between the laundry room right in front of the door to the
22 officers' podium as well, just like my office is. They are a
23 mirror reflection of one another.

24 **Q.** We have heard a little bit about formal count in this
25 case. Can you just briefly explain what that is?

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1 **A.** It's a process where we account for all of the prisoners
2 in the unit. The unit is shut down prior, about ten minutes
3 prior to it. All of the prisoners return to their cells. The
4 staff physically go around and they check to make sure
5 everybody -- there is breathing, living flesh in each and every
6 cell. Any prisoners that are absent due to being on some
7 assignment or visit, they are marked down, and it's reconciled
8 facility wide to make sure that each and every prisoner is
9 accounted for.

10 **Q.** What time does that occur?

11 **A.** On second shift when the officers were working that would
12 be at 16:20, which is 4:20 p.m.

13 **Q.** Is there a lot of prisoner movement before the formal
14 count?

15 **A.** Immediately prior to it, say about four o'clockish, just
16 prior to that actually, is when everybody is returning from
17 their assignments, from the yard, details and everything, and
18 the base area is incredibly busy during that period of time.

19 **Q.** In that unit, Housing Unit 2 back in 2011, did each
20 prisoner have their own cell or were they bunked with other
21 prisoners?

22 **A.** There was two prisoners per cell.

23 **Q.** In the large exhibit book in front of you marked
24 Plaintiff's Exhibits, could you flip to Exhibit 5, please.

25 **A.** Okay.

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1 || Q. Can you identify what that exhibit is?

2 **A.** This would be the logbook for -- a copy of the logbook for
3 Housing Unit 2.

4 | Q. Okay.

5 **MR. SCHNEIDER:** Your Honor, I would move for the
6 admission of Plaintiff's Exhibit 5.

7 MR. MOODY: No objection, Your Honor.

8 THE COURT: It's received as Plaintiff's 5.

9 | BY MR. SCHNEIDER:

10 Q. This logbook, that's where -- well, what is it? What is
11 this used for in the prison?

12 **A.** Any incidences, such as formal counts, are always logged.
13 That's a pertinent part of their job. But anything that
14 happens, from shift changes, the officers going to chow, and
15 any unroutine actions within the unit that occur during the day
16 get logged into this throughout the day.

17 MR. SCHNEIDER: Thank you. No further questions.

18 THE COURT: And on the plaintiff's side, cross.

19 MR. MOODY: Thank you, Your Honor.

20 || - - -

(9:28 a.m.)

CROSS-EXAMINATION

23 | BY MR. MOODY:

24 Q. Good morning, Officer Condon. Is that how you prefer I
25 address you, Officer?

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1 **A.** Actually, ARUS Condon. Good morning to you.

2 **Q.** ARUS Condon, okay. ARUS Condon, you testified on Thursday
3 about an incident with Mr. Bryant, right?

4 **A.** Correct.

5 **Q.** Okay. So you agree with me that an incident occurred.

6 You just disagree with my client as to what happened, right?

7 **A.** Correct.

8 **Q.** Okay. You then went on to testify on Thursday that you
9 were cleared of any wrongdoing by Assistant Deputy Warden
10 DeLeeuw, right?

11 **A.** Right.

12 **Q.** Assistant Deputy Warden DeLeeuw interviewed you with
13 regard to that incident, right?

14 **A.** In part.

15 **Q.** I didn't hear you.

16 **A.** In part, in part. He interviewed -- first he interviewed
17 the prisoner, other staff working, he had access to the videos,
18 and then he interviewed me finally. I was the last person
19 included in the interview process.

20 **Q.** Okay. You were the last one interviewed in that process,
21 right?

22 **A.** Correct.

23 **Q.** And he interviewed you one time?

24 **A.** Correct.

25 **Q.** Okay. And you described that interview as very brief,

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1 right?

2 **A.** Yes.

3 **Q.** And you also said in fact that during that interview it
4 was your belief that he didn't even know really what happened,
5 correct? That's Warden DeLeeuw. That's what your testimony
6 was about what he knew?

7 **A.** That's not accurate.

8 **Q.** Okay. Let's go to your -- you were deposed in this case,
9 right?

10 **A.** Correct.

11 **Q.** Okay. Can you turn to Exhibit 19, please.

12 **A.** Okay.

13 **Q.** Could you go to Page 98. I want to direct you to Line 4.
14 You were asked the question:

15 "What specifically did he, Warden DeLeeuw, ask you
16 about?"

17 Your answer:

18 "If there was any physical contact, if I assaulted
19 him. And I remember at the time that I asked him --
20 I stated that I didn't have any physical contact and
21 I inquired about what type of assault was being
22 referenced, and he, Warden DeLeeuw, didn't even know
23 like what the alleged assault was."

24 You went on further:

25 "I think it was pretty, I'm assuming here, a pretty
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1 generic statement that I assaulted him so, you then
2 concluded, Mr. DeLeeuw to the best of my recollection
3 didn't know what the assault really was."

4 Did I read that correctly?

5 **A.** Correct.

6 **Q.** Thank you. Now, a moment ago your counsel got up and
7 corrected you as to some dates. He pointed you to January 26
8 as the date of the alleged assault of Mr. Bryant, right?

9 **A.** Correct.

10 **Q.** But on Thursday you said something different, didn't you?

11 **A.** Correct, that was the --

12 **Q.** You said that you believed the assault occurred on
13 February 9th, 2011. Wasn't that your testimony from Thursday?

14 **A.** Correct. That was the date I was interviewed by our ADW.
15 I was mistaken.

16 **Q.** Oh, February 9th was the date you were interviewed by the
17 investigator?

18 **A.** Approximately, yes.

19 **Q.** February 9th, you said, 2011?

20 **A.** Approximately.

21 **Q.** Okay. Now, you are aware that Mr. Griffin reported what
22 he witnessed to Jessica Zimbelman at the ombudsman's office,
23 correct?

24 **A.** I am through this case.

25 **Q.** All right. You claim that you didn't know at the time,

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1 but as you sit here today, you are aware of that fact?

2 **A.** Correct.

3 **Q.** And you also claim that at the time that Mr. Griffin
4 reported the incident that you had no idea the ombudsman was
5 investigating the assault of Bryant, correct?

6 **A.** Correct.

7 **Q.** Okay. And you say that you don't even usually know when
8 the ombudsman is in the prison at all?

9 **A.** Correct.

10 **Q.** Would it surprise you to learn that the date February 9,
11 2011, when you were investigated by the warden, is the same day
12 that my client had an interview with Jessica Zimbelman about
13 the assault?

14 **A.** It wouldn't surprise me. I wasn't aware of that.

15 **Q.** So your position is you had no idea this investigation was
16 going on, you had no idea the ombudsman was even in the office,
17 but on the same day they were in the prison you were
18 interviewed by the deputy warden about the same event?

19 **A.** Correct.

20 **Q.** Now, you were working on February 9th, 2011, right?

21 **A.** Correct.

22 **Q.** Okay. I heard you testify a moment ago. You clarified
23 that the counselor's office is 36 feet from your office, right?

24 **A.** Correct.

25 **Q.** Okay. And then you went on to testify that around

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1 four o'clock, around count, it's very busy, there's a lot of
2 commotion, something to that effect, right?

3 **A.** Yes.

4 **Q.** So you don't have any idea where Larry Anthony was during
5 that time, do you?

6 **A.** Correct.

7 **Q.** From January to March 2011 you worked directly with
8 Defendant Officers McMurtrie and Downard, right?

9 **A.** Part of the day I did, correct.

10 **Q.** You were acting as the RUM at the time?

11 **A.** Correct.

12 **Q.** Okay. You heard that Mr. Anthony and Mr. Davis both
13 separately alleged that they overheard you having a
14 conversation with the two defendants about writing false
15 misconduct tickets for Mr. Griffin. You heard that testimony,
16 right?

17 **A.** I did hear that.

18 **Q.** Okay. You also heard Mr. Griffin testify that you told
19 him that his testimony to Ms. Zimbelman was going to "bite him
20 in the ass." You heard that, too, correct?

21 **A.** I heard that, correct.

22 **Q.** Okay. You deny all of that happened, right?

23 **A.** That's accurate.

24 **Q.** Okay. You claim a conversation with Mr. Griffin never
25 occurred on March 2nd, right?

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1 **A.** That's correct. I spoke with him on February 23rd in the
2 presence of others.

3 **Q.** Okay. You heard Officer Downard and Officer McMurtrie
4 testify that they were also working on March 2nd, right?

5 **A.** Correct.

6 **Q.** And you were working on March 2nd, right?

7 **A.** Correct.

8 **Q.** Okay. And you are aware now that Officer Downard wrote a
9 misconduct ticket against Mr. Griffin on March 2nd, right?

10 **A.** I became aware of that, yes.

11 **Q.** And Officer McMurtrie wrote a ticket on March 3rd, right?

12 **A.** I became aware of that, yes.

13 **Q.** So we have testimony from two different people that
14 overhead a conversation.

15 **A.** Yes.

16 **Q.** We have testimony from our witness that overheard -- that
17 states you had a conversation with him?

18 **A.** Yes.

19 **Q.** And it's all denied by you, but we still have two false
20 misconduct tickets on March 2nd and March 3rd, but you're going
21 to stick with your testimony that none of that is true, none of
22 those conversations happened, right?

23 **A.** I believe the statement of false misconducts is
24 inaccurate. He had a hearing.

25 **Q.** But you are going to maintain, despite all of that, that

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1 you had no conversation with him on March 2nd?

2 **A.** That's accurate.

3 **Q.** Officer Condon, during the time period -- I'm sorry, ARUS
4 Condon, during the time period of December 2010 to February of
5 2011 did other inmates report you for wrongdoing?

6 **A.** I have no idea.

7 **Q.** Did an inmate allege in 2010 that you harassed and
8 threatened him?

9 **A.** I don't know what you're referring to.

10 **Q.** Well, let me ask you this. Do you write false misconduct
11 tickets against prisoners?

12 **A.** No.

13 **Q.** Do you do unnecessary shakedowns?

14 **A.** No.

15 **Q.** Have you been accused by other inmates of that?

16 **A.** I don't know, but I have worked there for 21 years.

17 **Q.** Okay. I want to direct you to Exhibit 41 in the binder
18 right here.

19 **A.** Okay.

20 **Q.** Okay. I want to go to the "Case Description." Do you see
21 in the top left --

22 **MR. SCHNEIDER:** I object to the exhibit as
23 nonrelevant, having nothing to do with this case.

24 **THE COURT:** I will wait to rule on that. If it's not
25 relevant and I agree with it, then we'll exclude it.

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1 Go ahead.

2 **MR. MOODY:** All right. Thank you, Your Honor.

3 **BY MR. MOODY:**

4 **Q.** Do you see at the top here it says "Legislative
5 Corrections Ombudsman," correct?

6 **A.** I see that.

7 **Q.** And then four paragraphs down there's "Case Detail." Do
8 you see that?

9 **A.** Yes.

10 **Q.** Okay. It says "P," which presumably is prisoner, "is
11 being harassed and threatened by RUM Condon as well as other
12 officers with shakedowns and silly orders." Do you see that?

13 **A.** Yes, I do.

14 **Q.** And do you see just under that it says, "Letter received
15 from P." Do you see that?

16 **A.** Yes, I do.

17 **Q.** And the date next to it is 2-14-11?

18 **A.** Correct.

19 **Q.** Which is just five days after your investigation with
20 Warden DeLeeuw, correct?

21 **A.** Correct.

22 **Q.** Okay. Let's go to Exhibit 40.

23 **A.** Okay.

24 **Q.** Okay. Again, at the top do you see Legislative
25 Corrections Ombudsman?

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1 **A.** Yes, I do.

2 **MR. SCHNEIDER:** Same objection as to 41, 403 plus
3 nonrelevance, Rule 403.

4 **THE COURT:** The same objection being irrelevance?

5 **MR. SCHNEIDER:** Essentially, Your Honor. It also
6 falls under 403.

7 **THE COURT:** I'm not sure I understand, but go ahead.
8 Overruled.

9 **MR. MOODY:** Thank you, Your Honor.

10 **BY MR. MOODY:**

11 **Q.** We were looking, again, at Exhibit 40, ARUS Condon, and I
12 want to direct your attention down to near the bottom of the
13 page. There's the paragraph of "Actions." Do you see that?

14 **A.** Yes, I do.

15 **Q.** Okay. And then there's a 2-9-11 date. Do you see that?

16 **A.** I do.

17 **Q.** Okay. And about the second- and third-to-last sentences
18 state:

19 "Constant shakedowns and taking his stuff. He was --
20 this is the prisoner -- ticket free since 2005.
21 Received a minor because no number on his pants. RUO
22 Downard and McMurtrie are the problems as well as RUM
23 Condon."

24 Do you see that?

25 **A.** I do.

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1 **Q.** Okay. Do either of these instances refresh your
2 recollection as to shakedowns of other prisoners?

3 **A.** No. This was the ombudsman's office. This isn't
4 something within the department, and this isn't something
5 that's brought to our attention.

6 **Q.** Well, did either of these events occur, if you recall?

7 **A.** No.

8 **Q.** Are you saying they didn't occur?

9 **A.** I'm saying I'm unaware of anything like this occurring.

10 **Q.** Okay. So you are denying the incident with Mr. Bryant
11 January 29th, 2011. You're denying the incident that's the
12 subject of this lawsuit --

13 **THE COURT:** Maybe I misunderstood Officer Condon, but
14 I didn't think he denied. He said he didn't know.

15 **THE WITNESS:** I'm unaware of any of this taking
16 place.

17 **MR. MOODY:** That's correct.

18 **THE COURT:** That's different from today.

19 **MR. MOODY:** Judge, I was referencing Inmate Bryant's
20 incident in my latest question, but I'll ask again to clarify.

21 **BY MR. MOODY:**

22 **Q.** You deny assaulting Inmate Bryant in January of '11,
23 right?

24 **A.** Correct.

25 **Q.** You deny retaliating against my client in March of '11,

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1 correct?

2 **A.** Correct.

3 **Q.** You claim to have no knowledge in December of '10 of a
4 shakedown of another prisoner, correct?

5 **A.** Shakedowns aren't something that I perform.

6 **Q.** And you also deny another shakedown in February of '11 of
7 another prisoner, right?

8 **A.** Correct.

9 **Q.** ARUS Condon, you have worked over 20 years in the MDOC,
10 correct?

11 **A.** Correct.

12 **Q.** You have testified that you have seen co-employees be
13 abusive to inmates a total of three times in 20 years, right?

14 **A.** At the time of this deposition, that's correct.

15 **Q.** Okay. And you did see Ms. Zimbelman's report that listed
16 over 40 officers, 42 to be exact, listing much more than
17 three instances of abuse of conduct, correct?

18 **A.** Allegations of such, yes.

19 **Q.** Okay. Have you ever reported Officer Downard or Officer
20 Condon for any wrongdoing?

21 **A.** I'm Officer Condon, but --

22 **Q.** Excuse me, Officer McMurtrie or Officer Downard for any
23 wrong doing.

24 **A.** No.

25 **Q.** Okay. But you did testify when asked if Officer Downard
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1 had a temper, you said no, but he has "elevated reacting to
2 situations." Didn't you testify to that?

3 **A.** We all do, that's correct.

4 **Q.** Okay. And when you were asked for specific instances when
5 you had reported other officers, you had two instances.
6 One was when you reported a coworker for --

7 **MR. SCHNEIDER:** Your Honor, I would object to this
8 line of questioning as not relevant.

9 **THE COURT:** I am beginning to wonder whether and how
10 it's relevant, but I'm not going to shut down on it right now,
11 but keep that in mind as you go further.

12 **MR. MOODY:** Thank you, Your Honor.

13 **BY MR. MOODY:**

14 **Q.** With regard to one instance, you reported a coworker, a
15 co-employee, for opening a door to take off the handcuffs of a
16 prisoner in a wheelchair instead of using the slot that the
17 other prisoners are supposed to use to put their handcuffs
18 through; isn't that correct?

19 **A.** That's what officers are supposed to use, that's correct.

20 **Q.** You reported an officer for doing that?

21 **A.** Correct.

22 **Q.** Okay. And you also reported an officer for helping an
23 inmate write a grievance; isn't that right?

24 **A.** That wasn't the exact details.

25 **Q.** But an officer helped an inmate write a grievance, and you

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1 reported that officer; isn't that correct?

2 **A.** He --

3 **Q.** Will you please just answer my question. Did you report
4 another officer for assisting another prisoner in writing a
5 ticket?

6 **A.** He persuaded a group of prisoners to meet with him rather
7 than resolve any issues.

8 **Q.** And you said that that was "not the right thing to do"
9 because "he wanted to generate paperwork for administration to
10 deal with."

11 Is that accurate as to what your testimony was?

12 **A.** When I discussed it with him, he said his only purpose was
13 to generate paperwork and be a pain in the butt for
14 administration, that's correct.

15 **Q.** Oh, so you didn't testify to that at your deposition, but
16 now you state that he told you that; is that right?

17 **A.** He told me that. He told me that then, correct.

18 **MR. MOODY:** No further questions.

19 **THE COURT:** Mr. Schneider.

20 **MR. SCHNEIDER:** Thank you, Your Honor.

21 - - -

22 (9:43 a.m.)

23 **REDIRECT EXAMINATION**

24 **BY MR. SCHNEIDER:**

25 **Q.** And that's exactly what you said at your deposition, he

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1 told you that, correct?

2 **A.** Correct, because I was involved in the process, reporting
3 process and questioned him at that time.

4 **Q.** As to those two exhibits you were just shown, 40 and 41,
5 that claim that you were doing improper shakedowns, you don't
6 even do shakedowns, do you?

7 **A.** That's not part of my assigned duties, no.

8 **Q.** The corrections officers do that, right?

9 **A.** Correct.

10 **MR. SCHNEIDER:** Thank you.

11 **THE COURT:** Do you have anything?

12 **MR. MOODY:** Your Honor, may I just have 30 seconds,
13 please? Thank you.

14 - - -

15 (9:44 a.m.)

16 **RECROSS-EXAMINATION**

17 **BY MR. MOODY:**

18 **Q.** Just one brief line of questioning. You just testified at
19 your deposition, you said that you were told by the officer
20 that he just wanted to generate paperwork writing, right?

21 **A.** Initially by Officer Henricks, and then under direct
22 conversation with the officer --

23 **Q.** My question is directed toward your deposition. Your
24 counsel just got up here and asked you if you said that the
25 other officer told you that he was just trying to generate

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1 paperwork. You didn't say that at your deposition, did you?

2 **A.** That would be accurate in part.

3 **MR. MOODY:** Okay. Thank you.

4 **THE COURT:** Mr. Schneider.

5 **MR. SCHNEIDER:** Your Honor, I need a minute to find
6 it in the deposition, I guess.

7 **THE COURT:** I'm sorry, what did you say?

8 **MR. SCHNEIDER:** Your Honor, can we have five minutes
9 so I can find the portion of the deposition transcript and
10 clear this up?

11 **THE COURT:** Five minutes is much too long for this
12 jury to sit here.

13 **MR. SCHNEIDER:** All right.

14 - - -

15 (9:45 a.m.)

16 **REDIRECT EXAMINATION**

17 **BY MR. SCHNEIDER:**

18 **Q.** All right. Just to clarify, Mr. Condon, at your
19 deposition you explicitly said the other officer told you that
20 he was just trying to generate paperwork. Is that accurate?

21 **A.** That is accurate.

22 **MR. SCHNEIDER:** Okay. Thank you.

23 **THE COURT:** Nothing from the plaintiff?

24 **MR. MOODY:** Judge, if I may, I would just like to
25 read the transcript into the record, if that's all right.

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1 || **A.** I was never asked that.

2 Q. But you stated your specific opinion in what I just read,
3 didn't you?

4 A. Not my specific opinion. What I was told.

5 || MR. MOODY: Thank you.

6 MR. SCHNEIDER: All right.

7 **THE COURT:** I'll tell you that I can tell, on
8 plaintiff's side and defendants' side, that I'm getting tired.
9 I have been doing this a long time, and I suspect the jury is
10 getting tired of one silly spectacularly unimportant question
11 after another being asked by one side or the other, but go
12 ahead.

13 || Page

14 (9:47 a.m.)

REDIRECT EXAMINATION

16 BY MR. SCHNEIDER:

17 Q. ARUS Condon, can you flip a few pages forward to Page 58
18 of your deposition transcript.

19 A. 58?

20 Q. Yes.

21 A. Okay. I'm there. Which line?

22 Q. Lines 9 through 20. I'm just going to go ahead and read
23 it. You tell me if I read it accurately.

24 | A. Okay.

25 Q. The question was:

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1 "And you view that as a problem when a corrections
2 officer assists an inmate in the grievance process?"

3 Your answer:

4 "In that format that happened there? Yes, because he
5 could have called the quartermaster on Monday morning
6 and got some clothing issued for the prisoner. The
7 grievance, his attempt, as he admitted, was to
8 generate paperwork for administration to handle or to
9 be tied up with rather than --"

10 Did I read that correctly?

11 **A.** You did.

12 **MR. SCHNEIDER:** Thank you.

13 **THE COURT:** No further questions?

14 **MR. MOODY:** No further questions.

15 **THE COURT:** Very well. Mr. Condon, Officer Condon,
16 you are excused, and thank you.

17 **THE WITNESS:** Thank you.

18 **THE COURT:** Mr. Schneider.

19 **MR. SCHNEIDER:** Your Honor, the defense rests.

20 **THE COURT:** And plaintiff has rested and is not
21 contemplating immediately any rebuttal, I take it?

22 **MR. HUBBARD:** We do rest, Your Honor.

23 **THE COURT:** Thank you.

24 Well, we are at the point now where we're going to have
25 closing arguments. I don't know if this is a time we should

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1 take a break or not, and to a certain extent that would be up
2 to counsel if you wanted to take a short break and to a certain
3 extent it would be up to me, of course. I don't think it's
4 absolutely necessary, but if it's more convenient than
5 otherwise, we probably could consider it.

6 **MR. FINK:** Your Honor, I'm prepared to proceed. If I
7 could ask for five minutes to review the jury instructions that
8 I received this morning, that's all I would need, but I am
9 prepared to proceed.

10 **THE COURT:** All right. We'll take a ten-minute
11 break, and then we're going to wind this thing up with closing
12 arguments. Thank you for your patience.

13 (Jury out at 9:49 a.m.)

14 **THE COURT:** While court is in recess, you want to
15 study something?

16 **MR. FINK:** The jury instructions, Your Honor. I
17 appreciate it. I don't need much time. Thank you.

18 **MR. SCHNEIDER:** Your Honor, at some point I would
19 like to renew my motion for judgment as a matter of law and
20 directed verdict.

21 **THE COURT:** It's denied.

22 **MR. SCHNEIDER:** Thank you, Your Honor.

23 **THE COURT:** As is true of most of those things, it
24 doesn't mean that you can't renew it later.

25 **MR. SCHNEIDER:** Thank you, Your Honor.

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1 **MR. FINK:** Thank you, Your Honor.

2 (Recess from 9:50 a.m. to 9:57 a.m.)

3 **MR. FINK:** May I set up this easel as a
4 demonstrative?

5 **THE COURT:** You may.

6 **MR. FINK:** Thank you.

7 **THE COURT:** When that is done, are you ready for --

8 **MR. FINK:** Yeah. My cocounsel I think is in the
9 restroom, but I'm prepared.

10 Will Your Honor be able to see it?

11 **THE COURT:** I can see it, but not the letters. Don't
12 worry too much about me. I'll tell you if I can't.

13 **MR. FINK:** Okay.

14 **THE COURT:** Mr. Fink, you are doing all right on your
15 time estimate, but cocounsel --

16 **MR. FINK:** I was going to ask you, Judge, would you
17 like me to reserve the time I would need for rebuttal or do you
18 want me to keep an eye on the clock as I go?

19 **THE COURT:** You can within reason. I don't know what
20 you have in mind for closing argument, if it's within the half
21 hour contemplated, and if it is, a bit of that could be
22 reserved if you choose to do so.

23 **MR. FINK:** I am fine with the 30 minutes, Your Honor.
24 If this Court is okay with it and it's not otherwise
25 objectionable, if I could have 40 minutes and 5 minutes of it

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1 for rebuttal in total, I would be grateful, but I can do it
2 certainly within the guidelines of this Court.

3 **THE COURT:** I would prefer that you stay within the
4 guidelines, but I probably am going to tolerate a little bit of
5 excess.

6 **MR. FINK:** Thank you, your Honor.

7 **THE COURT:** But not much.

8 **MR. FINK:** I totally understand, and I'll reserve
9 five minutes of it for rebuttal and I'll keep a close eye on
10 the clock as I go.

11 **THE COURT:** Is everybody here?

12 **MR. FINK:** Plaintiff is, yes, Your Honor.

13 **MR. SCHNEIDER:** Yes.

14 **MR. HUBBARD:** Yes, indeed, we are.

15 **THE COURT:** If we're ready for the jury, I want to
16 say one more thing that I don't think I said before, but I
17 could be wrong about that. You had -- counsel had a piece of
18 paper or it was different and you had agreed apparently and I
19 have received it. It's in here now.

20 **MR. FINK:** Yes. The verdict form, Your Honor?

21 **THE COURT:** Yeah.

22 **MR. FINK:** It's substantially similar to defendant
23 counsel's proposal, and we agreed this morning.

24 **THE COURT:** Okay. We'll bring in the jury.

25 **MR. FINK:** Thank you.

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1 **COURT SECURITY OFFICER:** All rise for the jury.

2 (Jury in at 10:01 a.m.)

3 **THE COURT:** Thank you for being here, and thank you
4 for your patience. We are now ready for closing arguments, and
5 the first closing argument, of course, will be the closing
6 argument of the plaintiff.

7 You can go ahead with that if you are prepared to do so,
8 Mr. Fink.

9 **MR. FINK:** I am, Your Honor. Thank you.

10 Good morning, ladies and gentlemen. First of all, I want
11 to say thank you on behalf of the plaintiff's team and the
12 plaintiff himself. We are incredibly grateful for your time.
13 I know some of you had long commutes, and I know everybody has
14 their own concerns and their own lives, but you took a lot of
15 time to listen to somebody else's story. And for that -- I
16 think it might be the only thing we agree on, defense counsel
17 and I, but we can agree that we are very grateful to you for
18 taking the time to listen. Thank you.

19 This is a closing argument, ladies and gentlemen, and
20 unlike an opening statement, this is an opportunity for the
21 lawyers to put the puzzle pieces together, what you have heard
22 into argument form, into a story.

23 The evidence is what you will decide this case on, what
24 you heard on the witness stand, the documents and exhibits that
25 will be back in the jury room with you.

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1 You will be instructed by the judge on what the law is,
2 what our burden is, what we have to prove and how we have to
3 prove it. That is how the law works. And what I'm going to do
4 is put together a story of what I think we have shown you and
5 ultimately ask what we want you to do today. But it's not my
6 statements nor Mr. Schneider's statements that are the most
7 important. It's the evidence and the instructions from the
8 judge. I may give you a story during this argument or a quote
9 hopefully to make a point.

10 It's been said, ladies and gentlemen, that power tends to
11 corrupt. It's also been said that absolute power corrupts
12 absolutely. It's with this in mind that the framers of the
13 Constitution wrote probably the most magnificent document ever
14 written, the Constitution.

15 And in the Constitution, I'm sure you are very well aware,
16 is the Bill of Rights, and one of the Bill of Rights is the
17 First Amendment. Contained in the First Amendment is the right
18 of citizens, of individuals, including prisoners like
19 Mr. Griffin, to petition the Government for redress of
20 grievances and for free speech to speak out on matters of
21 public concern.

22 In order to enforce these rights, to make them have any
23 meaning so it's not just parchment, it's not just paper,
24 Congress gave juries like yourselves the power to enforce them
25 and that's why this is one of the, probably the highest calling

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1 for a private citizen of civic service is serving on a jury.

2 The reason we're here today is Section 1983, a statute
3 that was enacted by Congress to give meaning to the First
4 Amendment and the other rights in the Constitution. What
5 Section 1983 allows an individual with rights under the
6 Constitution like Mr. Griffin to do is sue individuals who are
7 acting under the color of state law. In other words,
8 individuals who are enrobed with some state authority and they
9 take some action that is contrary to a person's First Amendment
10 rights.

11 These gentlemen over here are wearing uniforms that have a
12 United States flag on them and the Michigan Department of
13 Corrections on their shirt. They are clothed in the authority
14 of this state of which we all live and in this country we all
15 live, and Section 1983 allows a prisoner to, an individual
16 including a prisoner to bring an action to enforce his civil
17 rights. And very important in that, what Congress decided to
18 do in that statute is make available punitive damages.
19 Punitive damages, the judge is going to instruct you on exactly
20 what it means, but essentially there's two purposes to punitive
21 damages. The first is to punish individuals for violating
22 constitutional rights, and the second is to deter the
23 individuals and others similarly situated from engaging in the
24 same type of conduct. Those are the two purposes. It's
25 punishment and deterrence that gives power to the Constitution

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1 and you to enforce it.

2 At the end of my closing I'm going to ask that for
3 two reasons you make a substantial award today. The first
4 reason is because the actions of these defendants took away
5 what little dignity a prisoner had. The little life he made
6 for himself in prison, they took it with a couple of tickets
7 and threatened him.

8 The other reason is because the culture in which they are
9 operating under Exhibit 44, the Gus Harrison Correctional
10 Facility, is horrific. It's a situation and a culture of
11 harassment, retaliation, degradation, humiliation and abuse.

12 I would ask that before you start your deliberations --
13 this is a 13-page report, and it's not as dense as it may
14 sound. It's actually quite short. If you take the time to
15 look through this exhibit and understand the lens from which or
16 the environment from which these guards were operating, it
17 needs to be stopped. You need to deter the behavior that was
18 engaged in by these defendants and others similarly situated.

19 It's been said, ladies and gentlemen, and actually my
20 father, who was a criminal defense attorney for 50 years,
21 unfortunately he passed away a couple of months ago, Neil Fink,
22 he used to tell me this quote when I was like eight years old,
23 and it's ever since been kind of a calling for me. It's
24 Dostoevsky's quote, some attribute it to Tocqueville, but it
25 says, "The degree of civilization in a society can be judged by

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1 entering one of its prisons." Essentially meaning, you know,
2 who we are as people can be judged by how we treat the
3 ostensibly least deserving. Who are we?

4 That's not okay. This is not punishment for prisoners.
5 This is beyond what we decided punishment is for.

6 Randle Griffin is incarcerated for a very serious crime.
7 He told you that he accepts the fact that it's very likely he
8 will be in prison for the rest of his life. He hopes not, but
9 it's probably the case.

10 So what he did, the reason to get out of bed in the
11 morning was carve out some sort of semblance of a life. His
12 incarceration, his punishment is that he can't decide when to
13 go outside when he wants, he can't decide when he's going to go
14 to the bathroom, when he's going to shower, when he eats. I
15 mean those are all things that are punishment. That's part of
16 being incarcerated, and we don't deny that.

17 What's not punishment is to take away any reason for
18 getting out of bed in the morning. What's not punishment is to
19 take away from Randle Griffin the ability to be on the warden's
20 forum, to have a job cleaning up board games that just gave him
21 some purpose, something to accomplish.

22 To put him in fear, to threaten him, to tell him he can't
23 speak out on abuse, otherwise he's going to get his ass beat
24 and put in the hole, that's not punishment. That's not the
25 punishment that comes with incarceration. That's abuse.

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1 So with that in mind, ladies and gentlemen, we have
2 two counts in this case. The first count are individual claims
3 against each of these three defendants. We allege that each
4 defendant in their individual capacity violated Mr. Griffin's
5 First Amendment rights by their own actions.

6 Now, in this first count each individual officer, Condon,
7 McMurtrie and Downard, took specific actions, and we're going
8 to ask that you hold them accountable for their conduct.

9 There are three basic elements that we have to prove to
10 you by a preponderance of the evidence. As my colleague,
11 Mr. Moody, told you in opening statement, that means more
12 likely than not. If that's 50.1 percent or 65 percent or
13 70 percent certain that something happened, it's just slightly
14 more probable than not that it happened. We have to prove each
15 of these elements by that standard.

16 The first is protected conduct. Protected conduct, you
17 will be instructed by the judge, means engaging in some kind of
18 constitutionally protected conduct. The judge will instruct
19 you that participating in the ombudsman's investigation is
20 protected current. So if you believe that happened, that is
21 protected conduct.

22 The second is that adverse actions were taken against
23 Mr. Griffin. Now, an adverse action is defined very simply.
24 It means was the action taken, if you believe it happened, was
25 the action taken enough to deter an ordinary person from

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1 engaging in the protected conduct? That's number one. So, in
2 other words, did the actions of each individual guard deter
3 Mr. Griffin, would it deter him from cooperating with the
4 ombudsman in the future?

5 And finally causation is the third element of this first
6 count. Causation means that we have to show by a preponderance
7 that the actions taken in number two were motivated at least in
8 part, it doesn't have to be the total reason, at least in part
9 by Mr. Griffin's engagement in the protected conduct. Did they
10 take those actions because he talked to the ombudsman?

11 That's the first count, ladies and gentlemen, each
12 individual officer being accountable for their actions.

13 The second count, ladies and gentlemen, is a conspiracy,
14 and a conspiracy means that all three of these defendants got
15 together, as you heard in the testimony, and agreed to violate
16 Mr. Griffin's First Amendment rights. There are four elements,
17 and I'll go through them briefly because they are rather
18 straightforward.

19 A conspiracy means -- it looks like my board is about to
20 go down.

21 A conspiracy means that there was a plan by two or more
22 defendants and that plan was shared by those two or
23 three defendants, that someone took an action on that plan,
24 one act, three acts, four acts, and that as a result of those
25 three elements Mr. Griffin's First Amendment rights were

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1 violated.

2 So, in other words, ladies and gentlemen, if you
3 understand or believe that we have proven to you that this plan
4 existed, that this conversation happened, that they agreed to
5 write tickets, that they agreed to take action against him for
6 his cooperation with the ombudsman, then only one of the
7 actions taken by the guards, the threat from Officer Downard,
8 the threat from Officer Condon, the ticket from Officer
9 Downard, the ticket from Officer McMurtrie, any of those in and
10 of itself is enough to make everybody liable for a conspiracy.
11 And we punish conspiracies because it's particularly evil when
12 you get together and have that intent. So, to the extent there
13 was any Constitutional violation and you think there was an
14 agreement, then we have proven to you a conspiracy.

15 So that's the law from which we're working, ladies and
16 gentlemen, and I'll talk about if we have proven those elements
17 to you, if you are satisfied that this violation occurred, what
18 we are going to ask of you today in terms of damages.

19 You heard, ladies and gentlemen, that Mr. Griffin is a
20 48-year-old man. He's married, has four kids. He's been in
21 jail for 26 years. He was in jail when he was 22. You heard
22 him tell you that it's likely to be the rest of his life and he
23 ran with the wrong folks in Detroit. That's what he told you.

24 But now, having lived in 15 different facilities, he's
25 become somewhat content in this being the rest of his life.

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1 It's a small life, but to Randle it's meaningful. Like I said,
2 he gets up, has tea, walks outside, eats lunch. He has a job,
3 and it's a little job, to clean up board games, but it's
4 somewhere for him to be, something for him to accomplish. Then
5 he goes to the library, then he mentors some younger inmates,
6 then he goes to bed.

7 That's it. That was Randle Griffin's purpose for getting
8 out of bed in the morning. That's what he told you. It's a
9 small life, but any dignity that he has left being inside the
10 walls, that's what he had.

11 When he was transferred to Gus Harrison, as he told you,
12 in the summer of 2010, he entered an environment that you heard
13 Jessica Zimbelman, an attorney and former investigator for the
14 Legislative Corrections Ombudsman, which you also learned is
15 kind of the watchdog of the prison. It's a State agency
16 created by the legislature.

17 You learned that Mr. Griffin walked into an environment
18 that had a systemic problem with harassment, humiliation and
19 abuse. A common scheme was going on in this prison that if you
20 did something that the guards didn't like, whether it was
21 proper or not, they were going to get you back.

22 And you heard Officer McMurtrie say that. His philosophy
23 is you get what you have coming to you, good or bad. That's
24 the philosophy of these correctional officers.

25 So Mr. Griffin nonetheless created this life that I just

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1 described, and then one winter afternoon in January of 2011 he
2 sees Officer Condon, at that time the RUM, the supervisor, he
3 sees him assault an inmate. Now, Mr. Griffin told you this
4 inmate wanted to go to protective custody, and ordinarily when
5 you hear that, the right of a prisoner to go to protective
6 custody is to protect himself from other inmates. Maybe they
7 are in a gang or something. This prisoner wanted to go to
8 protective custody because he was scared of the guards. So he
9 took his duffel bag on base and said I want to go to protective
10 custody.

11 The bulldog that Mr. Griffin described, Officer Condon,
12 not the same Officer Condon that you saw on the stand today,
13 got in Mr. Bryant's face, snatched the duffel bag out of his
14 hand, and dragged his wrist toward the ground and shook him.
15 Was this the most egregious assault of all time? Probably not,
16 but Mr. Griffin saw it and he knew exactly why it was
17 happening. He wanted to get away from the guards.

18 So this kid being a small -- he described him as a kid,
19 being small in stature, 5'7", 170 pounds, early 30s at the
20 time. Griffin says, "I'll be a witness for you. I'll support
21 your grievance. I'll support you writing to the ombudsman,
22 whatever." He does write an affidavit.

23 In response to that, the ombudsman comes to visit the
24 prison. As you heard from Jessica Zimbelman, she does
25 investigations on the more legitimate of complaints.

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1 So she comes to the prison on February 9th. We know that
2 from her documents and from her testimony. Interestingly, the
3 same exact day that RUM Condon is interviewed by the deputy
4 warden of the facility about the incidents with Bryant. The
5 same day. The same day Jessica Zimbelman was in the housing
6 unit right next to RUM Condon's office meeting with
7 Randle Griffin and meeting with Jeffrey Bryant, RUM Condon was
8 called into a meeting with his deputy warden to discuss the
9 Bryant assault.

10 Deputy Warden at one point didn't know anything, but this
11 morning he had interviewed everybody, he was really well
12 versed. Who knows what the real story is?

13 But RUM Condon on that day had a meeting about Bryant, and
14 he claims to not know that the ombudsman was there. I submit
15 to you that that makes little sense. The housing unit where
16 the meeting took place, ladies and gentlemen, you have heard
17 described. The officers' desk sees everything. There are only
18 three offices in the housing unit, and someone in plain clothes
19 would be recognized.

20 Mr. Griffin described this meeting, that he was called
21 over by an officer, went in and told his story to
22 Ms. Zimbelman, and Ms. Zimbelman, a lawyer, an investigator of
23 the State, confirmed and corroborated that story.

24 In the interim after this meeting happens with
25 Ms. Zimbelman, Mr. Griffin goes and secures a job as a porter,

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1 as we discussed, cleaning up board games. He goes and gets
2 elected to the warden's forum by his peers to serve as the
3 prison population spokesman.

4 The facility at that point didn't stop him from being on
5 the warden's forum, didn't stop him from getting a job. So
6 everything you have heard about, oh, he was a threat to the
7 good order of the facility from that innocuous letter that
8 Mr. Griffin read to you or there was other reasons that he
9 couldn't be on the forum or having a job, there was no problem
10 securing the job.

11 So March 2nd comes around, ladies and gentlemen, and
12 Randle Griffin leaves his warden's forum meeting, which is
13 undisputed, 2:30 or 2:35. Two officers told you it could take
14 about 20 minutes to get to the facility, which Randle Griffin
15 says it took him 20, 30 minutes by the time he got to the
16 facility through a couple gates, put his clothes down, and he
17 went to work. No problem. In fact, Officer McMurtrie opened
18 the door for him. So he went to work, no problems. He did his
19 job.

20 Later that afternoon he hears an announcement that the
21 mail is going to be passed out in a different way than the
22 warden's forum had asked that it be passed out. So he takes
23 Larry Anthony, who you also heard from, and they go up to
24 Defendant Condon's office and they say, "Hey, the mail is
25 supposed to be passed out this way."

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1 And RUM Condon doesn't remember, brushes them aside. But
2 he's summoned back to RUM Condon's office. RUM Condon all of a
3 sudden agrees that the mail will be passed out the way he
4 wants, but he says, "Talking to the ombudsman is going to come
5 back to bite you in the ass."

6 You can see the anger now building up. Mr. Griffin told
7 him about the mail problem, he's upset about the ombudman's
8 report, now he's angry. "It's going to bite you in the ass."

9 After he threatens him, a few minutes later he comes out
10 of his office and he goes to the officers' desk to meet with
11 these two other officers, Downard and McMurtrie, and he says,
12 "I'm tired of Griffin. We have got to get rid of him."

13 One of them says, "Well, I've got an idea. We'll write
14 some tickets on him. We'll take care of it."

15 Two witnesses hear this same conversation, two prisoner
16 witnesses. One is currently a prisoner. One is out on parole.
17 They hear this conversation.

18 Larry Anthony told you he was in the laundry room,
19 overheard the conversation. He didn't remember when, if he was
20 picking up a pen for his laundry duty or walking back to the
21 laundry room, but he knew what he heard.

22 And their story with regard to Mr. Anthony is, oh, he
23 couldn't have heard it because the dryers were too loud. But
24 then it changed to, no, the laundry room must have been closed
25 all of a sudden. They don't have a real answer for it.

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1 And, Mr. Davis, his testimony goes completely unimpeached,
2 that he heard the same conversation, and Mr. Davis, of all
3 people, someone still incarcerated by the Michigan Department
4 of Corrections, has absolutely no reason to lie. He has to go
5 back to prison. He's got no reason to lie. So Mr. Griffin's
6 story unimpeached is corroborated by two witnesses that this
7 conversation happened.

8 March 3rd comes around. Mr. Griffin finds out he's got a
9 ticket. He's got a ticket from Officer Downard for not showing
10 up to work the prior day. It was a false misconduct ticket.
11 They didn't say anything about it the day before. The day
12 after they had this conversation corroborated by two witnesses
13 they write a ticket against him because they know the
14 consequences. He's going to lose his job. He's going to get
15 kicked off the forum. He's going to be on top lock or laid in,
16 stuck in his cell. They know what they are doing. They all
17 testified they knew what happened to prisoners when these
18 tickets were issued.

19 He goes to work that day after he gets the ticket, and
20 McMurtrie says, "You no longer work here." Officer McMurtrie
21 over here, "You no longer work here, go back to your cell."

22 Later that day, Officer Downard, a tall and larger
23 gentleman, comes to his cell where he said he had every
24 opportunity during rounds to pass Randle's cell, and he says,
25 "You keep talking and I'm going to beat your ass and put you in

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1 the hole until you heal up, you fucking rat."

2 Putting him in the hole, as explained by Mr. Griffin,
3 until he heals up is so no one can see him until he's healed,
4 and "you fucking rat" had a design to put him in danger. And
5 Mr. Griffin described to you what kind of danger that puts you
6 in in prison being a "rat." One can imagine just from common
7 sense.

8 Then March 4th comes around. Randle Griffin is called to
9 ticket review again. Now he's got a ticket from Officer
10 McMurtrie, the same guy who told him not to be at work, for not
11 being at work.

12 McMurtrie is caught when the sergeant calls him, "I just
13 got this ticket. What's going on?"

14 "Oh, rip it up."

15 Now, Officer McMurtrie can't remember if the conversation
16 happened at control center. He says Griffin was there, but
17 then he wasn't there. He doesn't really know his story other
18 than to say, no, I didn't do it or I didn't do it to retaliate.

19 Officer McMurtrie also said to you on this witness stand,
20 he said I didn't have a problem with Griffin. He acted like he
21 almost didn't know him. That was the tone that I took. But
22 then, when confronted with his deposition, he had told me last
23 year, oh, they had to watch him, he was a problem.

24 He has a problem with him; he doesn't have a problem with
25 him. He was at ticket review. Randle was there. He doesn't

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1 know his story. Just, oh, I didn't do it.

2 So what resulted? He lost his job, he lost the warden's
3 forum, and he was stuck in his cell losing the other privileges
4 that he had: Library, being able to walk around the yard, the
5 things that give a human dignity.

6 Nothing in our story was meaningfully impeached.

7 Mr. Griffin told you a story. It was corroborated by a State
8 Appellate Defender Office attorney, a former investigator, and
9 two prisoner witnesses who have no reason to lie.

10 You know, in six years of litigation, the first question
11 that defense counsel asked of Mr. Griffin was whether he was
12 married in 2002 or 2003. He asked him, "You said on the stand
13 2002, and here is a marriage license. It was actually 2003."
14 That was the big "gotcha" moment after six years of litigation.
15 That's because Randle is telling the truth, why they couldn't
16 impeach him. The corroboration is there from the witnesses.
17 They were unimpeached.

18 Now, defendants, on the other hand, quite the other story
19 in terms of their credibility. You heard Officer Downard
20 testify on the witness stand that he falsified a report. He
21 lied on a document. First he says, "I don't know why I filled
22 it out that way." Then he says, "Oh, other people must have
23 told me that Randall was doing other things wrong so I circled
24 the exceptions." But then he quickly switched back when
25 pressured by my co-counsel that I really don't know.

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1 He was trying to make Randle look like he did a terrible
2 job. There was the incident that was the main ticket, but he
3 wanted to make it look like Randall was doing a bad job. So he
4 lied to you about that on the stand clearly.

5 And, as I said before, Officer McMurtrie was dishonest.
6 He said he didn't have a problem with Griffin, but he very
7 clearly had a problem with Griffin at his deposition. He said
8 he had to watch him. He was a problem --

9 **MR. SCHNEIDER:** Your Honor, I would object to this.
10 The evidence of sexual misconducts have been excluded, and now
11 for him to make this argument is just completely improper.

12 **THE COURT:** I'm not sure I understand what your
13 objection is.

14 **MR. FINK:** Your Honor, he can't repeat what he just
15 said, Your Honor. That is absolutely unsubstantiated,
16 uncorroborated and excluded from evidence, and he jumps up and
17 tosses that into the jury box. It's completely inappropriate
18 and complete without any factual basis.

19 **MR. SCHNEIDER:** To argue that he can't talk about
20 these incidents he knew about after having them excluded is
21 improper in a closing argument, Your Honor.

22 **MR. FINK:** I asked Officer McMurtrie about this, Your
23 Honor.

24 **THE COURT:** All right. If that's an objection, it's
25 overruled, and you can continue.

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1 **MR. FINK:** Thank you, Your Honor.

2 So McMurtrie contradicted himself, didn't have a problem
3 but did have a problem.

4 And then Officer Condon tells you that he had a meeting
5 the same day as Jessica Zimbelman came to the prison, on
6 February 9th, but he doesn't know what an ombudsman is or kind
7 of knows but doesn't know. Doesn't know when she's there.
8 He's meeting in the office next to her. He's working that day
9 but doesn't know who the plain clothes lady is in the prison.
10 It also doesn't make sense.

11 The same day also that Defendant Downard wrote his ticket
12 on March 2nd, the first false misconduct ticket, at exactly
13 10:01 p.m. Officer Downard and Officer McMurtrie walked out of
14 the prison together, the exact same minute. That was
15 30 minutes after Defendant Downard had written the ticket, and
16 they work in the same housing unit at the same desk. The
17 notion that they weren't talking about Mr. Griffin is hard to
18 believe.

19 Then the defendants put on Mr. Evers, who, despite the
20 fact that his testimony is obviously self-serving, to say that
21 he found him guilty, there are many contradictions in his
22 testimony.

23 The first, he testified he didn't review this tape of
24 whether Griffin was there or not. Somebody else reviewed it.
25 We have never seen it. They didn't produce who it was. They

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1 didn't put the witness who reviewed the tape. He just talked
2 to somebody who viewed this magical tape.

3 Then you heard from Officer Downard that the camera points
4 in one direction only. It doesn't see all around the facility.
5 We have no idea which way the camera was pointing at the time.

6 And then he says that he reviewed 15 minutes after and 15
7 minutes before he was late for work. Well, Mr. Griffin said he
8 didn't get there until 3:00 p.m., we acknowledge that, so the
9 tape wouldn't even cover whether Mr. Griffin was there or not.
10 So that testimony is of little weight, in our opinion.

11 He also said he was a hearing officer of 23 years and he's
12 never heard of any prisoner abuse. You have heard all of these
13 officers say they have never seen a guard abusing a prisoner.
14 It's a systemic problem at the facility.

15 So it's clear what the defense is. It's two fold. It's
16 no, no, no, we didn't do this and getting each other's back,
17 the thin blue line to support the other officers, and because
18 there's so many contradictions, they have another defense,
19 which you just heard from that objection. He's a prisoner.

20 How many, how many women did you have children with,
21 Randle? What were you convicted of, Randle? What were you
22 convicted of, Mr. Davis? What were you convicted of,
23 Mr. Anthony? These are prisoners. That's their defense. And
24 that objection was clear that that's their defense, to throw
25 something that prejudicial at you, no evidence of it.

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1 So, ladies and gentlemen, what does that bring me to in
2 the few minutes I have left here? I will have a chance to talk
3 to you one more time after Mr. Schneider talks because I have
4 the burden of proof so I get the last word on rebuttal, but in
5 the next couple of minutes here I want to explain to you what
6 we're asking given all of that.

7 Given all of the contradictions, the corroborations of
8 Mr. Griffin's story, and everything I have laid out for you we
9 submit to you this happened to Mr. Griffin. False tickets,
10 threats because he cooperated with the ombudsman's report.

11 If you agree, the question is what do we do about it?
12 Well, there are two important categories of damages that are at
13 play in this case. There's actual damages and there's punitive
14 damages.

15 Now, the actual damages, and you will hear the instruction
16 from Judge O'Meara, has compensatory damages, which means
17 giving Randle any money that he may have lost because of the
18 actions, but it also has something called presumed damages, and
19 presumed damages is an important category. What presumed
20 damages means is where it's hard to calculate what somebody may
21 have lost, and here it is because losing a job in prison,
22 losing any meaningful purpose in prison, that's kind of hard to
23 measure. That's not a dollar figure. But you are allowed to
24 consider with your reasonable and calm judgment what would
25 fairly compensate someone for losing those privileges.

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1 Now, as far as compensatory damages go and presumed
2 damages, I would ask you, listen to the instruction and use
3 your judgment. I'm not going to give you a number. I am going
4 to give you a number on punitive damages. But on compensatory
5 I ask that you use your judgment and think about someone who is
6 incarcerated probably for the rest of their life serving their
7 time. Think about who we are as a society. Is he entitled to
8 a little dignity? A job, ability to be on the warden's forum,
9 go read in the library, go outside, those little things. They
10 took it away from him, and I ask that you think about what
11 would be fair to compensate Randle for those losses.

12 Now, punitive damages, ladies and gentlemen, is what I'm
13 going to discuss with you here. I have told you before there
14 are two purposes of punitive damages. The first is punishment.
15 You must prove -- we must prove that there was intentional
16 conduct or some kind of evil conduct. Intentional or evil. We
17 submit to you that we have shown you that.

18 So it's less about awarding the plaintiff and more about
19 punishing the defendants, this award. Punish them for what
20 they did. Punish them for lying to you on the witness stand.
21 Punish them for the effect it's had on Randle.

22 Now, the second is probably the most important
23 justification for punitive damage and in this case. So, if
24 nothing else, I want you to remember this. This report, along
25 with the actions of these officers, in order to stop this

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1 behavior from, not just happening to Mr. Griffin, but clearly
2 many of the prisoners in Gus Harrison Correctional Facility,
3 you need to deter this conduct with a substantial award. You
4 know, if you give a small award, 100 bucks, 1,000 bucks, no
5 officer is going to turn their head and change any of their
6 behavior. It has to be substantial to stop the behavior.

7 It affects people's parole, it affects their dignity, and
8 it will lead to other abuses. If other prisoners are deterred
9 from talking to the ombudsman or other state investigators,
10 further abuses will result clearly and people like Mr. Griffin
11 won't speak up because they are afraid of their own
12 retaliation. Imagine what would happen. You have an ability,
13 an important ability, the highest civil service serving on a
14 jury, and you can send a message and you can have a major
15 impact on what goes on inside Gus Harrison Correctional
16 Facility.

17 **THE COURT:** You are up against the clock.

18 **MR. FINK:** If I may, Your Honor, two more minutes is
19 all I need, as I crash the --

20 **THE COURT:** Go ahead.

21 **MR. FINK:** Thank you.

22 I have a human easel so that will make it easier.

23 Ladies and gentlemen, on Count One on punitive damages I
24 ask that you award Mr. Griffin and against each defendant
25 \$15,000. This is Count One so each individual action, Officer

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1 Downard's ticket, Officer Downard's threat, Officer McMurtrie's
2 ticket, and Officer Condon's threat and his planning this whole
3 thing.

4 It's not lost on us that this is a lot of money, I want to
5 be honest with you, and it's not lost on me the idea that the
6 money is going to a prisoner. That is not lost on us.

7 Punitive damages serve two purposes, punishment and deterrence.

8 On Count Two, ladies and gentlemen, on conspiracy, we ask
9 you to award a total of \$25,000 divvied up amongst the
10 defendants as you see their culpability level. So if we have
11 proven a conspiracy to you, I ask that you award a total of
12 \$25,000 and divvy it up as you see fit.

13 And I'll conclude with this, Your Honor.

14 I'm good with that Brandon. Thank you.

15 Alexis de Tocqueville said, "America is great because she
16 is good, and if America ever ceases to be good, she will cease
17 to be great."

18 That means that at our core we are decent and we will lend
19 a hand to people who need help. Mr. Griffin had his dignity
20 taken away from him. I know he's a prisoner, but he's still a
21 human, and the abuses that went on inside Gus Harrison are
22 atrocious.

23 I ask that you read this report and punish these
24 defendants and deter other defendants by awarding the amounts
25 that I have asked you for.

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1 I'll speak to you in a few minutes, ladies and gentlemen.

2 Thank you.

3 **THE COURT:** Thank you, Mr. Fink.

4 Mr. Schneider.

5 **MR. SCHNEIDER:** Thank you, Your Honor.

6 Good morning.

7 All right. As I stated before, we are back here now for
8 our closing arguments. It's my job to go over the elements of
9 the specific claims here that you have to decide and to discuss
10 the facts that you have heard in light of those elements.

11 I would like you to keep in mind, and you will be
12 instructed by the judge during the reading of the jury
13 instructions, it's the plaintiff's burden of proof in a case
14 like this. It's not the defendants' burden to disprove it.

15 Now, I'm going to talk about adverse action first. You
16 have heard about all three of these elements already. You have
17 the protected conduct, the adverse action, and the causation.
18 I'm going to take them a little bit out of order here.

19 With the adverse action, as to the McMurtrie ticket, this
20 ticket was dismissed the next day with no negative consequences
21 to the plaintiff. That ticket, that's not something that would
22 deter a person from cooperating with the ombudsman or anything
23 else.

24 Now, the Downard ticket, this was the ticket on March 2nd,
25 as a result of that ticket the plaintiff had to do ten days

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1 loss of privileges, so essentially he had to stay in his cell
2 except for meals and law library. He got a hearing on that
3 ticket where a hearings officer decided whether he was guilty
4 or not. Again, having a ticket like that and going to a
5 hearing, that's not something that would deter a person from
6 exercising their First Amendment rights.

7 The same thing with the threat at the cell door. The
8 plaintiff alleges that Officer Downard came to his cell door
9 and made some sort of threat to him. All of these actions are
10 not actions in a prison that would deter prisoners from making
11 complaints.

12 We have evidence of that. We have a 13-page report from
13 the ombudsman's office full of similar allegations from other
14 prisoners against other officers. None of them were deterred.
15 They still made their complaints. The question you have to ask
16 is whether an action would deter a person from continuing to
17 make those complaints, and we can see that these actions did
18 not. The plaintiff himself states that he continued to contact
19 the ombudsman, continued to file grievances, continued to file
20 lawsuits. Not just this one, but subsequent to this.

21 Now, as to causation, this is where the plaintiff has to
22 prove that, because of his protected conduct, adverse action
23 was taken against him. Now, the first part of this evidence as
24 to causation, the plaintiff says that RUM Condon told him in
25 his office your cooperating with the ombudsman is going to come

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1 back to bite you in the ass.

2 Now, you heard RUM Condon deny that that conversation ever
3 occurred. He said he had no way to know that the plaintiff was
4 involved with the ombudsman. Certainly the ombudsman didn't
5 know any of the defendants. When she was in court, she was
6 asked if she recognized them. She did not. They all testified
7 they did not know her. And the ombudsman testified those
8 interviews were secret. She never disclosed the identities of
9 those people to the prison.

10 Her report, this is the 13-page report. If you go to
11 Exhibit 44 in the exhibit book and you go just behind it,
12 there's a couple of responses from the actual prison staff.

13 So if we go down to the second memorandum after that, this
14 is a memorandum from the warden, Warden Klee, to Denny Straub,
15 deputy director of the whole department. He lists the date.
16 The warden lists the date he actually received the report,
17 March 9th, after these alleged tickets. It's not as if the
18 prison had possession of this report prior to these alleged
19 instances on March 2nd and 3rd.

20 I don't want to go through this whole thing, but the gist
21 of it, and you can read it yourself if you want, is the warden
22 says he brought in his executive staff, the deputy warden, a
23 couple ADWs, and an inspector. No other staff, but he brought
24 in the top staff, and they were dumbfounded by what they were
25 read in this report.

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1 The report goes on to explain why they were dumbfounded
2 about it. The warden at some point said he asked Zimbelman,
3 "Can you at least tell us who is making these allegations so we
4 can do some kind of investigation?" Zimbelman declined. She
5 wouldn't provide any of that information to the prison, and
6 that's in these memos that you can read, Exhibit 44.

7 Now, as to the timing of this conversation that allegedly
8 occurred in RUM Condon's office on March 2nd, it was the
9 plaintiff's testimony that he was at a warden's forum meeting
10 until 2:35. It then took him 20 or 30 minutes to get back to
11 his unit, and he went right to work.

12 Now, he says that that March 2nd ticket he got was a false
13 ticket because he claims he actually went to work that day. He
14 also says that he was in the RUM's office at 3:30. So if he
15 got back from the warden's forum meeting at three o'clock and
16 went to work, he can't be somewhere else having a meeting with
17 the RUM. He can't be in two places at once.

18 Now, this is the conversation where allegedly he was told
19 by RUM Condon that his ombudsman cooperation would bite him in
20 the ass. That just never happened.

21 Now, we also had RUM Evers come in. He was the person who
22 heard the plaintiff on the ticket. He had the video reviewed.
23 Let me just pull this up.

24 So the plaintiff's story to RUM Evers was that he went to
25 work at three o'clock. RUM Evers had the video reviewed

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1 15 minutes before and after three o'clock, and the plaintiff
2 was never shown working. This is Defendant's Exhibit E. You
3 have both the ticket and the hearing report that RUM Evers
4 completed.

5 We also have the witnesses Anthony and Davis we heard from
6 about a separate conversation. Anthony and Davis both
7 testified that after this meeting in the RUM's office they
8 heard all three of the defendants discussing together, plotting
9 at the desk.

10 Now, first of all, neither Anthony nor Davis testified
11 that they heard any plot related to the ombudsman in any way.
12 It was related to forum duties, some mail issue, nothing to do
13 with the ombudsman. It's a separate issue. The alleged
14 protected conduct here, his cooperation with the ombudsman, not
15 participation with the warden's forum complaining about the
16 mail issues.

17 Neither Anthony nor Davis heard anything about the
18 ombudsman. They both said it was about the mail issues.

19 Now, Anthony, he's the laundry guy who said he heard this
20 conversation from the laundry room. We now know the laundry
21 room was closed at the time. He couldn't have been there.

22 The laundry room was also 27 feet away from the officers'
23 desk. Just before count during a time of mass movement when
24 you've got all of the prisoners walking through going back to
25 their cells, you can imagine, it's very loud. You are not

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1 going to hear a conversation from 27 feet away even if you
2 could be there in the closed laundry room.

3 Davis was the witness who eventually identified Officer
4 Downard I think by reading his name tag there. He still
5 couldn't identify the other two defendants when he was up there
6 on the stand. He was testifying as to what ARUS Condon said
7 but didn't know who he was.

8 Now, again, Davis' story was that he was coming in from
9 yard for formal count. This is when all of the prisoners come
10 in together. They have got to go back in their cells and get
11 locked up so they can be counted. It's mass movement. It's
12 very loud in the unit again. Davis claims to have heard a lot
13 of conversation for just walking by during a time like this in
14 the prison.

15 Now, the plaintiff, he said that when he got back from his
16 warden's forum meeting he didn't check in with anybody, he
17 didn't tell anybody he was late for his job, but he claimed
18 that Officer McMurtrie let him into the supply closet sometime
19 after three o'clock, which is consistent with his story that he
20 left the warden's forum at 2:35, and it was 25 or 30 minutes
21 later to get back to his cell.

22 So this is the Plaintiff's Exhibit 5. This is the logbook
23 for the unit. And what we have here, March 2nd, 14 to 2200.
24 So this is the second shift. 1400 is when the officers came on
25 shift.

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1 Now, where is it? Okay. At 1455 we have got RUO
2 McMurtrie leaving the unit to go do mail and get chow. He
3 doesn't come back until 1525. "McMurtrie in," right there. He
4 wasn't even in the unit when the plaintiff claims to have been
5 let into the supply closet by McMurtrie.

6 The last part of the story that the plaintiff has that he
7 went to work is I asked him on the stand, "Well, how many other
8 prisoners were in the dayroom?" What I wanted to get at was,
9 "Well, maybe you were in there and they just couldn't see you."

10 The plaintiff had no idea how many people were in there.
11 So I asked him, "Was it more than two? He couldn't even answer
12 that question. He had no idea how many people were in there
13 because he wasn't there because he didn't go to work.

14 Now, you heard testimony from Downard and McMurtrie they
15 have worked together only since 2011. This happened in March
16 of 2011 so it was less than two months that they worked
17 together. They have different regular days off. So you have a
18 five-day shift, and the other person's two days don't line up
19 with yours. You are working together three days a week.

20 They also only overlapped RUM Condon's shift by two to
21 three hours. We can also see in this logbook, I think, what
22 time RUM Condon left on this day. It's a little tough to read,
23 but at 16:27, that's 4:30, "Condon out of unit."

24 What the plaintiff wants you to believe is that after only
25 working together for a short time like this these defendants,

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1 they would get together and conspire and be out to get him over
2 essentially nothing.

3 RUM Condon had a grievance filed on him by Prisoner
4 Bryant. The assistant deputy warden looked into it, and he
5 cleared RUM Condon. He didn't get into trouble, nothing like
6 that.

7 During that interview process the plaintiff's name never
8 came up. He was certainly not part of the grievance process.
9 His involvement was just something else. That was the
10 ombudsman's investigation.

11 None of these defendants had any reason to be mad at the
12 plaintiff, and I submit to you the plaintiff hasn't met his
13 burden to prove that he was written this ticket because of his
14 conduct with the ombudsman. Rather, he was written a ticket
15 because he didn't go to work and he was being paid to do that
16 job and he has to be there.

17 Now, after the conversation at the desk later in the day,
18 we are still on March 2nd, the plaintiff testified that Officer
19 Downard came to his cell and called him a rat.

20 Now, you heard there were cellmates in every room.
21 Plaintiff had a cellmate. There were cells next door,
22 prisoners all over the place, and Officer Downard allegedly
23 makes these threats loudly and there's not a single other
24 witness of this. The plaintiff's cellmate didn't hear it. No
25 other prisoners heard it. Again, it's just something that did

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1 not happen.

2 The plaintiff, he filed a grievance about his allegations
3 in this case, and that's Plaintiff's Exhibit 6. A grievance in
4 the prison is where the prisoner gets to write down some
5 problem that he's had and submits it. The prison considers it,
6 they give him an answer, and then he can appeal if he wants to.

7 So on -- let me find the date here. Okay. The plaintiff
8 wrote this on March 7th. So this is a few days after the
9 events we're talking about.

10 You can look through here, what the plaintiff wrote
11 happened. There's no mention of "rat" anywhere in there.
12 There's no mention of a conversation with Condon anywhere in
13 here. The plaintiff didn't make those allegations up until
14 afterwards when he was ready to file his lawsuit.

15 Day two, on March 3rd. This is the day the plaintiff got
16 the second ticket for not showing up to work. This one was by
17 Officer McMurtrie.

18 The plaintiff testified that at 2:05 he received a copy of
19 his ticket from the day before, and he knew at that point he
20 was laid in. Now, being laid in at prison, that means you
21 don't go to work. So at 2:05, before shift starts, the
22 plaintiff finds out about the ticket from the day before, he
23 knows he's laid in, and now he's come here to court and says,
24 "Yeah, I went to work that day, too, or tried to."

25 No, the plaintiff knew he was laid in. There's no way he

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1 would try to go to work. He already knew he was confined to
2 his cell. That just doesn't make any sense.

3 I'm sorry, the mouse is a little temperamental here on the
4 big screen.

5 If there's any question about when he met with Sergeant
6 Howard, it's right here in the ticket. Review date and time,
7 March 3rd, 15:02, prior to his shift starting on March 3rd. So
8 he knew right then and there he was laid in.

9 Now, the plaintiff would have you believe that McMurtrie
10 wrote this ticket because of this grand conspiracy. In fact,
11 McMurtrie wrote the ticket because he didn't know the plaintiff
12 was laid in. Once he found out, he talked to Sergeant Howard,
13 McMurtrie himself told Howard, "Yeah, just rip up the ticket,
14 we'll be done with it."

15 Now, as to protected conduct, the plaintiff had a story
16 where RUM Condon grabbed Prisoner Bryant's arm and snatched his
17 bag out of his hand and that's it. That was his deposition
18 testimony, if you remember.

19 Now in court suddenly it's Condon came out like a bull,
20 grabbed his arm, snatched his shirt, grabbed his shirt, balled
21 it up in his hand and was shaking the kid.

22 Mr. Bryant is 39 years old, by the way. He was 33 back
23 then. He was not a kid.

24 Now, of the 240 prisoners that you heard were housed in
25 this unit, no other witnesses. Plaintiff admitted on the stand

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1 he didn't tell anybody in the prison, not another prisoner or
2 another officer or anybody until he stopped in on that
3 ombudsman meeting with Mr. Bryant on February 9.

4 Now, that's the alleged protected conduct, that
5 February 9th meeting with the ombudsman. Plaintiff hasn't
6 presented any evidence that defendants knew about that meeting.
7 And if they did and they are mad about it, he hasn't shown any
8 reason why this alleged adverse action, the tickets, occurred a
9 month later in March. The plaintiff just hasn't shown any
10 connection between that meeting and what he's here today to
11 claim happened bad to him.

12 Now I'm going to briefly address damages. The plaintiff
13 says he lost his job. Well, he only had the job for four days,
14 you heard. Two months later he got the same job at another
15 prison.

16 In prison, you heard testimony, you are required to go to
17 work or go to school. You don't have a choice. You've got to
18 do one or the other. Losing a job that you had for four days,
19 again, that's not something that would deter a prisoner from
20 continuing to file grievances or anything else.

21 The plaintiff is also accusing the defendants for causing
22 him to be kicked off the warden's forum. Now, you saw Exhibits
23 A and F of the defense. I don't need to pull them up here
24 again.

25 What they show is that the plaintiff was kicked off at a

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1 different prison, kicked off the forum and he was banned from
2 coming back for a year. Now, the plaintiff knew about that
3 when he ran in February. He wasn't supposed to, and it took a
4 couple of weeks for the inspector to catch that, but they did
5 and they removed him as a result. It had nothing to do with
6 the defendants here, and you can look at those memorandums.
7 One is from the deputy warden, one is from the warden at the
8 past facility, and they explain that.

9 Now it's also time for you to deliberate. You are going
10 to hear from the plaintiff's counsel briefly again, and then
11 the judge is going to read you all of the jury instructions.
12 Hopefully they line up with the law as the attorneys have laid
13 it out. If not, what the judge says controls. You don't have
14 to listen to us.

15 Now, once you have heard all of the jury instructions, you
16 can go back in the room finally to deliberate. The case is in
17 your hands at that point.

18 You are going to have a verdict form. The first question
19 is going to be whether the defendants violated the plaintiff's
20 First Amendment rights. I would ask that you check no as to
21 each one and go ahead and return a verdict in the defendants'
22 favor. Thank you.

23 **THE COURT:** Thank you, Mr. Schneider.

24 You have a tiny bit of time left.

25 **MR. FINK:** I'm sorry, Judge?

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1 **THE COURT:** You have a tiny bit of time left.

2 **MR. FINK:** I appreciate that. I will be brief.

3 As I told the judge, I will be brief. There's a couple
4 points that I want to address that Mr. Schneider brought up,
5 and of course, like I said before, it's because I have the
6 burden of proof that I'm speaking with you.

7 I want to address the logbooks for a moment. First of
8 all, Mr. Schneider made the assertion that if McMurtrie was out
9 14:55 to 3:30 or so, so 2:55 to 3:30, that Mr. Griffin couldn't
10 have been let into the supply closet. For obvious reasons,
11 there are a number of reasons where it could have been
12 three o'clock, shortly after three o'clock when he signs the
13 book, leaves. There was no testimony from Officer McMurtrie on
14 this at all. You know, they just suddenly put together a
15 closing argument. "Oh, he was out of the unit." Officer
16 McMurtrie never said that.

17 And also, if we are going to rely on the logbooks, ladies
18 and gentlemen, I want to make one very important point.
19 Officer Downard on March 2nd said that Randle Griffin was out
20 of place and he didn't show up for work, presumably didn't know
21 where he was. This logbook says nothing about a missing
22 prisoner. In fact, it says, I forgot the word that's used, but
23 everybody is accounted for. If Prisoner Griffin was missing,
24 they didn't know where he was or why he didn't show up for
25 work, it would be in the logbook. So if we're going to rely on

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1 the logbook, let's take note of the fact that everybody was
2 accounted for when Randle was supposed to be at work on
3 March 2nd, which he was.

4 Also, defense counsel makes the point that they had only
5 been working together for a few days and I'm presenting this
6 story that they all are now lining up against Griffin. Let's
7 just not forget that Officer McMurtrie drove his car over to
8 Officer Downard's house one weekend to fix the muffler.

9 Clearly they had a relationship. It wasn't just some guy he
10 worked with three days a week.

11 You know, I think it's really particularly important in
12 this case, Mr. Schneider mentioned that nothing came of the
13 complaint with Bryant, he got cleared. That's the problem.
14 That's the problem. The internal ticket found Randle guilty.
15 The internal investigation of Condon, nothing wrong. That's
16 why the award has to be substantial today because nothing is
17 going to change from Exhibit 44, which I ask that you read
18 before you deliberate, if you don't deter them.

19 Two more quick things, ladies and gentlemen. They are
20 trying to make some legitimate ticket out of both Downard and
21 McMurtrie's tickets, yet totally ignores the fact that Officer
22 Downard said that Randle Griffin had 30 violations of his work
23 duty in five days. There's no purpose to fill out the form
24 that way other than trying to get at Randle Griffin, trying to
25 make it look worse. There's no other reason to write the

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1 report that way or the work evaluation that way.

2 It took some time for Randle to get a job. So it wasn't
3 just a job that he had five days. Randle told you it's hard to
4 get a job in prison, and it took him several months after to
5 get a job. That's \$43 a month for several months of not having
6 a job. Yes, you can go to school, but if you don't have an
7 assignment, you are in your cell and it's hard to get a job in
8 prison. So it wasn't just five days. It's that he finally
9 secured one, and they took it from him.

10 And, finally, you would think that the administration
11 would have stopped him from getting on the warden's forum if
12 the real reason was because he had been kicked off of the
13 warden's forum before. So instead, after all of this happens,
14 Randle Griffin is such a problem talking to the ombudsman, they
15 use this innocuous letter where he promises diligent and
16 professional redress from the regional prison administrator,
17 that that's somehow a threat to the good order of the facility.
18 It's pretext, ladies and gentlemen. It's pretext. It happened
19 eight days after the conversation happened with Condon they
20 kicked him off the forum.

21 In sum, there is no accountability within the system,
22 none. They all protect their own. They all tote the party
23 line like they did in court. No, no, no, we didn't do this.
24 They are prisoners. They are lying. This can't be. That's
25 why we are here today asking you to put a stop to it.

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1 I appreciate your time very much. I wish you the best in
2 deliberations, and talk to each other, listen to each other,
3 and thank you again.

4 **THE COURT:** Thank you, Mr. Fink, Mr. Schneider.

5 It's now 11 o'clock essentially, and I'm looking at the
6 jury instructions. I think they will take about 50 minutes,
7 50, 5-0. Do you need to go to the jury room and come back in
8 here in a few minutes? If you don't, we'll go right ahead.

9 **THE JURORS:** No, go ahead.

10 **THE COURT:** Go ahead, thank you.

11 Members of the jury, the evidence and arguments in this
12 case have been completed, and now I will instruct you as to the
13 law. Faithful performance of you of your duties is vital to
14 the administration of justice. The law you are to apply in
15 this case is contained in these instructions, and it's your
16 duty to follow them. You must consider them as a whole and not
17 pick out one or some instructions and disregard the others.

18 One of the mysteries of life for someone at my age is what
19 do you do with electronic sounds that you don't know where they
20 are. I don't -- I believe Mr. Barkholz may come down here and
21 fix this, but right now my question is: Can you hear me? If
22 you can, I'll try to keep this out of the way.

23 Following my instructions, you will go to the jury room
24 and deliberate and decide on your verdict.

25 Probably two or three people in the jury can help me, but

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1 I think you just need to turn down the --

2 **MR. FINK:** Do you want me to take a look, Your Honor?

3 **THE COURT:** Anybody can take a look. I don't --

4 **MR. SCHNEIDER:** Do you have speakers you can turn

5 down? I think you are getting a little feedback. If you turn
6 the volume down on the speakers, I think that would help.

7 **THE COURT:** That makes sense except I don't know
8 where it is.

9 (Brief discussion held off the record.)

10 I apologize for the delay. Let's continue.

11 Facts to be determined from evidence. It's your duty to
12 determine the facts from evidence received in open court. You
13 are to apply the law to the facts and in this way decide the
14 case.

15 Sympathy or prejudice must not influence your decision,
16 nor should your decision be influenced by prejudice regarding
17 race, sex, religion, national origin, age, handicap or any
18 other factor irrelevant to the rights of these parties.

19 The evidence you are to consider consists of testimony of
20 witnesses and the exhibits offered and received. The admission
21 of evidence in the court is governed by the rules of evidence,
22 and from time to time it's been my duty as a judge to rule on
23 the admissibility of evidence. You must not concern yourself
24 with the reasons for these things, and you must not consider
25 any exhibit to which an objection was sustained.

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1 Arguments, statements and remarks of attorneys are not
2 evidence, and you should disregard anything said by an attorney
3 which is not supported by evidence or by your own general
4 knowledge and experience. However, an admission of a fact by
5 an attorney is binding on his or her client.

6 One type of evidence is known as the admission of a party.
7 The admission may be a statement made in a pleading filed in
8 the case, a statement on the record during testimony or a
9 statement on a written exhibit. Attorneys may also make an
10 admission on behalf of their clients.

11 This case should be considered and decided by you as a
12 dispute between persons of equal standing in the community, of
13 equal worth and holding the same or similar stations in life.
14 All persons stand equal before the law and are to be treated as
15 equals.

16 I have not meant to indicate any opinion as to the facts
17 in my rulings, conduct or remarks during the trial, but if you
18 think I have, you should disregard it because you are the sole
19 judges of the facts.

20 In determining whether any fact has been proved, you shall
21 consider all of the evidence bearing on that fact without
22 regard to which party produced the evidence.

23 There are, generally speaking, two types of evidence from
24 which a jury may properly find the truth as to the facts of the
25 case. One is direct evidence, such as the testimony of an

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1 eyewitness. The other is indirect or circumstantial evidence,
2 the proof of a chain of circumstances pointing to the existence
3 or nonexistence of certain facts.

4 It's not necessary that every facts be proven directly by
5 a witness or an exhibit or a fact may be proven indirectly by
6 other facts and circumstances from which it usually and
7 reasonably follows according to the common experience and
8 observation of mankind. This is called circumstantial
9 evidence, which you are to consider along with other evidence
10 in the case.

11 As a general rule, the law makes no distinction between
12 direct and circumstantial evidence but simply requires that the
13 jury find the facts in accordance with all the evidence in the
14 case, both direct and circumstantial.

15 You have a right to consider all of the evidence in light
16 of your own general knowledge and experience in the affairs of
17 life and take into account whether any particular evidence
18 seems reasonable and probable. However, if you have personal
19 knowledge of any particular fact in this case, such knowledge
20 may not be used as evidence.

21 You, as the jurors, are the sole judges of the credibility
22 of the witnesses and the weight their testimony deserves. You
23 may be guided by the appearance and conduct of the witness or
24 by the manner in which the witness testified or by the
25 character of the testimony given or by the evidence contrary to

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1 the testimony given.

2 You should carefully scrutinize all of the testimony
3 given, the circumstances under which each witness has
4 testified, and every matter in evidence which tends to show
5 whether a witness is worthy of belief.

6 Consider each witness's intelligence, motive, state of
7 mind, demeanor or manner while on the stand.

8 Consider each witness's ability to observe the facts as to
9 which he or she has testified and whether he or she impresses
10 you as having an accurate recollection of these matters.

11 Consider also any relation each witness may bear to either
12 side of the case, the manner in which each witness might be
13 affected by the verdict, and the extent to which each witness
14 is either supported or contradicted by other evidence in the
15 case.

16 Inconsistencies or discrepancies in the testimony of a
17 witness or between the testimony of different witnesses may or
18 may not cause you, the jury, to discredit the testimony.
19 Two or more persons witnessing an incident or a transaction may
20 see and hear it differently. An innocent misrecollection is
21 not an uncommon experience. In weighing the effect of a
22 discrepancy, always consider whether it pertains to a matter of
23 importance or an unimportant detail and whether the discrepancy
24 results from innocent error or intentional falsehood.

25 In making your own judgment you will give the testimony of
11-14876; *Griffin v. Condon, et al.*

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1 each witness such weight as you determine it deserves. You
2 may, in short, accept or reject the testimony of any witness in
3 whole or in part.

4 It has been brought out that an attorney or its
5 representative has talked with a witness. An attorney or an
6 attorney's representative may properly talk with a witness for
7 the purpose of learning what the witness knows about the case
8 and what testimony he or she will give.

9 Although you may consider the number of witnesses
10 testifying on one side or the other when you weigh the evidence
11 as to a particular fact, the number of witnesses alone should
12 not persuade you if the testimony of a lesser number of
13 witnesses is more convincing.

14 During trial certain evidence was presented to you by the
15 reading and viewing of depositions. A deposition is a record
16 of the sworn testimony of the parties or witnesses taken before
17 an authorized person. All parties and their attorneys have the
18 right to be present and to examine and cross-examine the
19 witnesses. The evidence is entitled to the same consideration
20 as you would give the same testimony had the witness or
21 witnesses testified in open court.

22 If you determine that a party at some earlier time said
23 something that does not agree with what the party testified to
24 here about an important point, you may consider the earlier
25 statement, not only in deciding whether you should believe the

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1 party, but also as evidence of the facts in this case.

2 The law does not require any party to call as witnesses
3 all persons who may have been present at any time or place
4 involved in the case or who may appear to have some knowledge
5 of the matters at issue in this trial, nor does the law require
6 any party to produce as exhibits all papers and things
7 mentioned in the evidence in the case.

8 The burden is on the plaintiff in a civil action such as
9 this to prove every essential element of his claim by a
10 preponderance of the evidence. If the proofs should fail to
11 establish any essential elements of the plaintiff's claim by a
12 preponderance of the evidence in the case, the jury should find
13 for the defendants as to that particular claim. In this case
14 for the defendants because there are multiple defendants.

15 To establish by a preponderance of the evidence means to
16 prove that something is more likely so than not so. In other
17 words, a preponderance of the evidence in the case means such
18 evidence as when considered and compared to what evidence that
19 is opposed to it has more convincing force and produces in your
20 mind's belief that what is sought to be proved is more likely
21 true than not true.

22 This rule does not, of course, require proof to an
23 absolute certainty since proof to an absolute certainty is
24 seldom possible in any case.

25 In determining whether any fact at issue has been proved

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1 by a preponderance of the evidence in the case, the jury may,
2 unless otherwise instructed, consider the testimony of all
3 witnesses regardless of who may have called them and all
4 exhibits in evidence regardless of who may have produced them.

5 Charts and summaries have been showed to you in order to
6 help explain facts disclosed by books, records or other
7 documents in evidence in the case. These charts and summaries
8 are not themselves evidence of proof of any facts. If the
9 charts or summaries don't correctly reflect the facts or
10 figures shown by the evidence in the case, you should disregard
11 them. Charts and summaries are used only as a matter of
12 convenience. To the extent that you find they are not
13 truthful, some of the summaries of facts or figures shown by
14 the evidence in the case, you are to disregard them entirely.

15 You are to consider only the evidence in the case.
16 However, you are not limited to the statements of the
17 witnesses. You may draw from the facts you find -- you may
18 draw from the facts you find have been -- let me see if I can
19 get this sentence all together.

20 You may draw from the facts you find have been proved such
21 reasonable inferences as seem justified in light of your
22 experience. Interferences are deductions or conclusions that
23 reason and common sense lead you to draw from the facts
24 established by the evidence in the case.

25 Although there is more than one defendant in this action,

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1 it does not follow from the facts alone -- from that fact alone
2 that if one defendant is liable to the plaintiff all defendants
3 are liable. Each defendant is entitled to a fair consideration
4 of the evidence. Neither defendant is to be prejudiced if you
5 find against the other. All instructions I give you cover the
6 case as to each defendant.

7 You are not required to accept testimony even though the
8 testimony is uncontradicted and the witness is not impeached.
9 You may decide because of the witness's bearing and demeanor or
10 because of the inherent improbability of the witness's
11 testimony or for other reasons you find sufficient that such
12 testimony is not worthy of belief.

13 I shall now give you the definitions of some important
14 legal terms. Please listen carefully to these definitions so
15 that you will understand the terms when they are used later.

16 Before the trial of this case there were certain
17 stipulations or agreements in which the parties agreed to facts
18 that could be taken as true without further proof. The
19 stipulated facts are as follows:

20 On March 2nd, 2011, Defendant Joseph Downard wrote a
21 misconduct ticket against the plaintiff for being out of place.

22 On March 3rd, 2011, Defendant Gary McMurtrie wrote a
23 misconduct ticket against the plaintiff for being out of place.
24 This ticket was dismissed on March 4, 2011.

25 Plaintiff lost his job as a porter as a result of the

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1 misconduct ticket written by Defendant Joseph Downard as of
2 March 2, 2011.

3 These are three different stipulated facts which the
4 parties have agreed to and stipulated as to at the beginning of
5 the trial.

6 Generally speaking, the Federal Civil Rights Act under
7 which plaintiff brings this suit was enacted by Congress to
8 enforce the 14th Amendment to the United States Constitution.
9 The 14th amendment to the Constitution provides that:

10 "No state shall make or enforce any law which shall
11 abridge the privileges or immunities of citizens of
12 the United States, nor shall any state deprive any
13 person of life, liberty or property without due
14 process of law, nor deny to any person within its
15 jurisdiction the equal protection of the laws."

16 As a matter of law, the Constitution of the United States,
17 every citizen has the right to his liberty, that is, the right
18 not to be wrongly denied his First Amendment rights. Every
19 person has the right under the Constitution to the freedom of
20 speech, the freedom to raise matters of public concern, and the
21 freedom to petition the Government for a redress of grievances.

22 Section 1983 of the Civil Rights Act -- of the Civil
23 Rights statute under which plaintiff sues provides that a
24 person may seek relief in this court by way of damages against
25 any person or persons who under color of any state law or

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1 custom subjects such person to the deprivation of any rights,
2 privileges or immunities secured or protected by the
3 Constitution or laws of the United States.

4 Plaintiff in this case claims that the evidence shows that
5 he participated in the Legislative Corrections Ombudsman's
6 investigation of the Gus Harrison Correctional Facility, which,
7 if true, is protected by First Amendment rights. Plaintiff
8 claims he was retaliated against for exercising these rights.

9 In order to prove his claim, the burden is upon Plaintiff
10 Griffin to establish by a preponderance of the evidence each of
11 the following elements:

12 First, that the defendant was engaged in constitutionally
13 protected activity;

14 Second, that the defendants took adverse actions against
15 the plaintiff which would likely deter a person of ordinary
16 firmness from continuing to engage in the protected conduct;

17 Third, that the defendants' adverse actions against him
18 were motivated at least in part by plaintiff's protected
19 conduct.

20 If you find that plaintiff has proved by a preponderance
21 of the evidence each of these elements, your verdict will be
22 for the plaintiff. If you find the plaintiff has not proven by
23 a preponderance of the evidence each of these elements, your
24 verdict will be for the defendants.

25 Count One of the plaintiff's complaint, in that count

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1 plaintiff claims that all three of the defendants in this case
2 violated Section 1983 of his civil rights individually.
3 Accordingly, I give you the instructions on each element that
4 the plaintiff must prove, and you are instructed to decide if
5 each individual defendant based on his own actions is liable to
6 the plaintiff. You may find that none, one, two or all
7 three defendants are liable to plaintiff for plaintiff's direct
8 claims.

9 The first element plaintiff must prove is that he engaged
10 in protected activity. Well, the first element plaintiff must
11 prove is that he engaged in protected conduct under the First
12 Amendment of the United States Constitution. Protected conduct
13 under the First Amendment includes informing appropriate
14 government bodies of improper conduct by prison officials. A
15 prisoner also retains a First Amendment right to respond to
16 questions by a prison investigator as long as he does not
17 intentionally or recklessly make false statements.

18 The second element he must prove is that one, two or
19 three or all three of the defendants took an adverse action or
20 took adverse actions against the plaintiff which would deter a
21 person of ordinary firmness from continuing to engage in the
22 protected conduct under the First Amendment.

23 In other words, in order to satisfy the
24 Second Amendment -- the second element, not the
25 Second Amendment -- in order to satisfy the second element,

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1 plaintiff must demonstrate that the actions plaintiff alleges
2 were taken by one, two or all of the defendants would have the
3 effect of deterring an ordinary prisoner from informing
4 appropriate government bodies of alleged misconduct by prison
5 officials by responding to questions posed to an ordinary
6 prisoner by a prison investigator.

7 The third and final element plaintiff must prove in order
8 to prevail against any or all individual defendants by his
9 claims is that the adverse actions that you find occurred were
10 motivated at least in part by plaintiff's protected conduct
11 under the First Amendment. This element centers on the
12 defendant's motives because direct evidence of retaliatory
13 intent is rare.

14 Circumstantial evidence may be used to establish a
15 connection between each defendant's action and the plaintiff's
16 protected conduct. For example, you are permitted to infer
17 retaliatory motive based upon a close temporal proximity
18 between the protected conduct and the alleged retaliatory acts.

19 If you find that any or all of the adverse actions were
20 causally related, at least in part, to plaintiff's alleged
21 protected conduct, then this element has been met. However, if
22 a defendant proves that he would have taken the same action in
23 the absence of a protected activity, the element of causation
24 is not met with respect to that adverse action.

25 Count Two of plaintiff's complaint. In that count

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1 plaintiff claims that all three defendants collectively
2 conspired to violate plaintiff's First Amendment rights. A
3 conspiracy under 1983 exists where there's an agreement by
4 two or more defendants to injure plaintiff by violating his
5 constitutional rights. In order to succeed on this conspiracy
6 claim, plaintiff must prove the following elements:

7 First, that a single plan or agreement by two or more --
8 or it was a single plan or agreement by two or more defendants;

9 Second, a shared conspiratorial objective by two or more
10 defendants occurred; and

11 Third, that an overt act committed by one or more
12 defendants in furtherance of the conspiracy -- that an overt
13 act was committed by one or more in furtherance of the
14 conspiracy; and

15 Four, that injury to the plaintiff occurred, that is, the
16 plaintiff suffered a constitutional violation.

17 The fourth element requires you to find that at least
18 one of the constitutional violations complained of occurred.

19 You are instructed that each conspirator need not have
20 known all of the details of the illegal plan or all of the
21 participants involved, but rather that each coconspirator
22 shared in the general conspiratorial objective and that
23 objective was accomplished by one or more of the coconspirators
24 violating plaintiff's constitutional rights.

25 In order to find for the plaintiff on his conspiracy

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1 claim, you must find that plaintiff suffered a violation of his
2 First Amendment rights as described in prior instructions.
3 However, you are not required to find that all of plaintiff's
4 theories of constitutional violations have occurred in order to
5 find for plaintiff on the conspiracy.

6 For example, you may believe that all of the defendants
7 conspired to violate plaintiff's First Amendment rights but
8 that only one defendant actually violated plaintiff's rights.
9 If that was the case, as an example only, you would find for
10 the plaintiff.

11 You are instructed that if you find plaintiff has proved a
12 conspiracy, you must find two or all of the defendants are
13 liable to the plaintiff.

14 If you find the plaintiff, Randle Griffin -- if you find
15 in favor of Randle Griffin, then you must award him such sum as
16 you find from a preponderance of the evidence will fairly and
17 justly compensate him for any damages you find he sustained as
18 a direct result of the alleged unconstitutional conduct.

19 There are two types of damages involved in this category
20 of actual damages: Compensatory damages and presumed damages.

21 In making a damages determination, you can consider the
22 category compensatory damages, which are actual losses suffered
23 by the defendant. For this issue you should consider the
24 plaintiff's wages lost due to the alleged constitutional
25 violation.

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1 The law also provides for presumed damages when a First
2 Amendment violation occurs. Presumed damages are appropriate
3 when the plaintiff suffers an actual injury but damages are
4 difficult to establish or measure. There is no definite
5 standard or method by which you are to calculate any presumed
6 damages. If you believe plaintiff should be awarded damages,
7 you may use your common reasonable judgment in light of the
8 evidence as to the amount of reasonable compensation. You must
9 not include any amount for emotional or mental distress but
10 rather the value of plaintiff's losses.

11 Plaintiff claims he lost a number of liberties that he had
12 before the alleged misconduct took place in this case. You are
13 permitted to approximate compensation for real injuries, if
14 any, you believe occurred as a result of the constitutional
15 violation. These damages are designed to compensate actual
16 losses that are difficult to measure in dollar amounts and must
17 reflect the real injury sustained, not the abstract value of
18 the constitutional right at issue or the importance of the
19 right to our system of government.

20 Throughout your deliberations you must not engage in any
21 speculation, guess or conjecture, and you must not award any
22 damages under this instruction by way of punishment or through
23 sympathy.

24 If you find the plaintiff, Mr. Randle Griffin -- if you
25 find plaintiff's damages have no monetary value, then you must

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1 return a verdict for plaintiff in the nominal amount of \$1.

2 In addition to the damages mentioned in the other
3 instructions, the law permits you to award an injured person
4 punitive damages under certain circumstances in order to punish
5 defendants for some extraordinary misconduct and to serve as an
6 example or a warning to others not to engage in such conduct.

7 If you find in favor of the plaintiff, Randle Griffin, and
8 against any or all of the defendants, Louis Condon,
9 Gary McMurtrie and/or Joseph Downard, and/or if you -- and/or
10 you find liability or a conspiracy against two or more
11 defendants, and if you find the conduct of any or all
12 defendants as submitted was recklessly and callously
13 indifferent to plaintiff's First Amendment rights, then, in
14 addition to any other damages for which you may find the
15 plaintiff is entitled, you may but are not required to award
16 plaintiff an additional amount as to punitive damages if you
17 find it, if you find it is appropriate to punish any and all
18 defendants or deter any or all defendants and others from like
19 conduct in the future. Whether to award punitive damages and
20 the amount of those damages are within your sound discretion.

21 You may assess punitive damages against any or all
22 defendants or you may refuse to impose punitive damages. If
23 punitive damages are assessed against one -- against more than
24 one defendant, the amounts assessed against each defendant may
25 be the same or they may be different.

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1 If you find the defendants violated plaintiff's rights
2 more than once, plaintiff is entitled to be compensated only
3 for the injuries plaintiff actually suffered.

4 Unless the defendants violated plaintiff's rights more
5 than once but the resulting injury was no greater than it would
6 have been had the defendant violated his rights one time, you
7 should award an amount of compensatory damages no greater than
8 you would award if defendants had violated plaintiff's rights
9 only one time. If defendants violated plaintiff's rights more
10 than once and you can identify separate injuries resulting from
11 separate violations, you should award an amount of compensatory
12 damages equal to the total of the damages you believe will
13 fairly and justly compensate plaintiff for the separate
14 injuries plaintiff suffered.

15 Finally, this instruction does not apply to punitive
16 damages. Punitive damages may be awarded against any or all of
17 the defendants in any amount you deem appropriate given your
18 instructions on punitive damages.

19 The following instructions concern the matter of your
20 deliberations.

21 Upon retiring to the jury room, you will elect one of your
22 number to act as a foreperson, as the foreperson. The
23 foreperson will preside over your deliberations and will be
24 your spokesperson here in court.

25 The verdict with respect to the considered judgment -- it

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1 must represent the considered judgment of each juror. In order
2 to return a verdict, it's necessary that each juror agree.

3 Your verdict must be unanimous. It's your duty as jurors
4 to consult with one another and to deliberate with a view to
5 reaching an agreement if you can do so without violence to
6 individual judgment.

7 You must each decide the case for yourself but only after
8 an impartial consideration of the evidence in the case with
9 your fellow jurors. In the course of your deliberations, do
10 not hesitate to examine your own views and change your opinion
11 if convinced it is erroneous, but don't surrender your honest
12 conviction as to the weight or effect of the evidence solely
13 because of the opinion of your fellow jurors or for the mere
14 purpose of returning a verdict.

15 Remember at all times that you are not partisans, you are
16 judges, judges of the facts. Your sole interest is to seek the
17 truth from the evidence in the case.

18 If it becomes necessary during deliberations, your
19 deliberations, to communicate with the Court, you may send a
20 note signed by the foreperson by way of one of the Court's
21 staff members. When you reach an agreement as to the verdict,
22 you should send a note to the staff signed by the foreperson on
23 which you state only that a verdict has been reached.

24 It is proper to add the caution that nothing said in these
25 instructions, nothing in any form of verdict prepared for your

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1 convenience is to suggest or convey in any way or manner any
2 inclination as to what verdict I think you should find. What
3 the verdict shall be is the sole and exclusive duty and
4 responsibility of the jury.

5 I will give you a copy of these instructions for your use
6 while deliberating. It's available to each of you. If you
7 have any questions about the law or your duties as jurors, you
8 should consult the instructions as given to you.

9 I am also sending all of the exhibits with you for your
10 use while deliberating. I think -- I don't know anything that
11 is not deliverable. It usually makes it clear that it will
12 have to be the kind of exhibit that can be transported to the
13 jury room, and usually they -- I think we'll be talking about
14 that here.

15 A verdict form is attached to these instructions. You
16 will take this form to the jury room, and when you have reached
17 an agreement as to the answers in accordance with these
18 instructions, you will have your foreperson, foreman fill in
19 the date and sign the form. You will then notify the Court's
20 staff that you have reached a verdict and bring the verdict
21 form with you upon your return to the court. I will now
22 explain the form of verdict to you.

23 This is with the court and cause, Randle Griffin is the
24 plaintiff and Louis Condon, Joseph Downard and Gary McMurtrie
25 are the defendants. It's entitled Form of Verdict.

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1 The first question: Do you find the plaintiff proved by a
2 preponderance of the evidence that any of the defendants
3 violated the plaintiff's First Amendment rights?

4 For each of the defendants, Condon, Downard and McMurtrie,
5 you have a space to mark yes or no. For each of them yes or no
6 as you go down the list. If you answered "no" as to all of the
7 defendants, you have reached a verdict. You can have your
8 foreperson sign the verdict form and inform the bailiff. If
9 you answered "yes" as to any defendant, complete Questions 2
10 and 3.

11 Question 2: Do you find that the plaintiff has proved by
12 a preponderance of the evidence that two or more of the
13 defendants committed a conspiracy to violate the plaintiff's
14 first amendment rights?

15 Again, each of the defendants, Condon, Downard and
16 McMurtrie, are listed and by each of them a place to put yes or
17 no, whichever you decide.

18 And 3: We find the plaintiff has proved his claim by a
19 preponderance of the evidence in Count One and/or Count Two and
20 we award damages in the following amounts.

21 And then for each of these defendants, Condon, Downard and
22 McMurtrie, you have a place where you can fill in the blank of
23 presumed or nominal damages -- actual compensatory, presumed or
24 nominal damages and also a line for that defendant for filling
25 in any punitive damages you believe are appropriate for that

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1 defendant.

2 The same is true for the other two defendants, Downard and
3 McMurtrie. You may have for each of them actual compensatory,
4 presumed or nominal damages on one line, and on another line
5 with another dollar sign in front of it, if you make a decision
6 in that direction, for punitive damages.

7 And that's true of the third defendant as well,
8 Mr. McMurtrie.

9 You have now reached a verdict. Have your foreperson sign
10 the verdict form and inform the bailiff. It is signed by the
11 jury foreperson and dated today.

12 I usually before I send the jury to the jury room ask if
13 lawyers for either plaintiff or defendants believe that I, I'm
14 not talking about do you agree with everything I said in the
15 jury instructions, but did I misstate anything by putting a not
16 where there shouldn't have been or putting something in that
17 changed the meaning entirely?

18 **MR. FINK:** Plaintiff is satisfied with the reading of
19 the jury instructions, Your Honor.

20 **MR. SCHNEIDER:** The same from the defendants,
21 Your Honor. I believe they were read accurately.

22 **THE COURT:** Thank you. We will now swear in the
23 bailiffs and you will be sent to the jury room to do your
24 sacred duty, and thank you so much for being good citizens and
25 being here and doing this so far. Now you've got the real

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1 work.

2 Let's see.

3 (The bailiffs were sworn.)

4 **THE COURT:** Thank you. Go to the jury room and
5 commence your deliberations. Thank you.

6 (Jury out at 11:45 a.m.)

7 **THE COURT:** I hope counsel will at least for the
8 first hour and a half or so, it might take longer than that, if
9 you will keep yourselves available to telephones or whatever,
10 cell phones I think, to be notified by within a half an hour to
11 come back. As you know, most of what the jury wants to talk to
12 lawyers about happens right away.

13 At any rate, thank you for being here. Thank you for your
14 cooperation.

15 **MR. SCHNEIDER:** Your Honor, do you want eight exhibit
16 books from each side for the jury or just one? We have to pull
17 out all the non-admitted exhibits still to create some jury
18 books.

19 **MR. FINK:** Plaintiff has our exhibits ready to be
20 submitted to the jury, Your Honor. These are the ones that we
21 admitted.

22 **THE COURT:** That's going to take some work by the
23 defendants?

24 **MR. SCHNEIDER:** If it's just one book, then it will
25 just take a couple of minutes, Your Honor. If it's eight

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1 books --

2 **THE COURT:** One book sounds good to me, but if they
3 insist that they want more, we'll have to do something else.

4 **MR. SCHNEIDER:** These are all of the defendants'
5 exhibits that we admitted so we are ready to go with that.

6 **THE COURT:** All right. Thank you all, and I will let
7 you know as soon as we hear something.

8 **MR. SCHNEIDER:** Thank you, Your Honor.

9 **MR. HUBBARD:** Your Honor, in terms of logistics in
10 submitting the actual exhibits, do you wish for us to approach
11 and present them to the Court?

12 **THE COURT:** Present them to one of the people who
13 have been sworn in as representatives.

14 **MR. HUBBARD:** Certainly. Thank you, Judge.

15 **THE COURT:** That would usually be Mr. Barkholz, but
16 it doesn't have to be.

17 **MR. FINK:** For the record, we have shown our exhibits
18 to opposing counsel so I'm going to submit these to the
19 bailiff.

20 **THE COURT:** Thank you.

21 (Recess from 11:48 a.m. to 2:32 p.m.)

22 **THE CLERK:** Court is reconvened in the case of
23 *Randle Griffin v. Louis Condon, et al.*, Case Number 11-14876.

24 **THE COURT:** You may be seated. I have a note from
25 the person who apparently is the foreperson, who is in Seat

11-14876; *Griffin v. Condon, et al.*

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1 Number 5, I'm told. I can't read his name, but I know -- well,
2 I've got it here someplace. Here we go. Mr. Fotchuk. And he
3 says in this note, "We are unable to reach unanimous decision
4 or verdict on Item Number 1 for any of the defendants. We do
5 not feel that we will be able to reach a unanimous decision
6 regardless of the time." And it's signed by Mr. Fotchuk.

7 I am going to call them in and read them the Allen charge
8 and send them back out. I'm not sure exactly what the chances
9 are that they will find some resolution, but we will urge them
10 to do so. All right?

11 **MR. FINK:** Yes, Your Honor.

12 **MR. SCHNEIDER:** Yes, Your Honor.

13 **THE COURT:** Bring in the jury.

14 **THE CLERK:** All rise for the jury.

15 (Jury in at 2:35 p.m.)

16 **THE COURT:** Please be seated, members of the jury.
17 Thank you for your hard work and your patience. I have a note
18 from the foreperson, Mr. Fotchuk. Have I got that right?

19 **JUROR NO. 5:** Yes.

20 **THE COURT:** "We are unable to reach a unanimous
21 decision or verdict on Item Number 1 for any defendant. We do
22 not feel that we will be able to reach a unanimous decision
23 regardless of the time."

24 I must urge you, consistent with what I'm going to say
25 next, to return to the jury room and do it again, try to get by

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1 the effort that you have not been successful at so far and
2 arrive at a unanimous verdict.

3 Member of the jury, I am going to ask you to return to the
4 jury room and deliberate further. I realize you are having
5 some difficulty reaching unanimous agreement, but that's not
6 unusual, and sometimes after further discussion jurors are able
7 to work out their differences and agree.

8 Please keep in mind how very important it is for you to
9 reach unanimous agreement. If you can't agree and this case is
10 tried again, there is no reason to believe that any new
11 evidence will be presented or that the next 12 -- in this case
12 eight jurors will be any more conscientious or impartial than
13 you are.

14 But may I remind you that it's your duty as jurors to talk
15 to each other about the case and listen carefully and
16 respectfully to each other's views and keep an open mind as you
17 listen to what your fellow jurors have to say.

18 Let me remind you it's your duty to make every reasonable
19 effort to reach a unanimous agreement, each of you, whether or
20 not they -- you are in the majority or the minority. You ought
21 to seriously reconsider your position in light of the fact that
22 other jurors, who are just as conscientious and impartial as
23 you are, have come to a different conclusion. Those of you who
24 believe the Government has proved the defendant guilty beyond a
25 reasonable doubt should stop and ask yourself if the evidence

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1 is really convincing enough.

2 And given that the other members of the jury are convinced
3 and those of you who believe the government has not proved the
4 defendant guilty beyond a reasonable doubt should stop and ask
5 yourself --

6 **MR. SCHNEIDER:** Your Honor?

7 **MR. HUBBARD:** Your Honor, I sincerely apologize for
8 interrupting the Court while giving an instruction. I believe
9 the most two recent sentences given by the Court are in the
10 context of --

11 **THE COURT:** I'm not understanding what you're saying.

12 Yes.

13 **MR. HUBBARD:** Your Honor, respectfully, I believe
14 that the last two sentences that the Court read to the jury are
15 in the context of a criminal case.

16 **THE COURT:** I believe you are right.

17 **MR. HUBBARD:** And I sincerely apologize for
18 interrupting.

19 **THE COURT:** Don't apologize. I believe you are
20 right, and I was about to hang up on that myself.

21 **MR. HUBBARD:** Thank you, Judge.

22 **THE COURT:** And to modify what I had said, to those
23 of you who believe the Government has not proved its case
24 should stop -- not that the Government has not proved its
25 case -- I guess that works here -- should stop and ask

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1 yourselves if the doubt you have is a reasonable one given that
2 other members of the jury don't share your doubt. None of you
3 should hesitate to change your mind if after reconsidering
4 things you are convinced that other jurors are right and that
5 the original position was wrong.

6 But remember this. Don't ever change your mind just
7 because other jurors see things differently or to get the case
8 over with. As I told you before, in the end your vote must be
9 exactly that, your own vote. As important as it is for you to
10 reach unanimous agreement, it's just as important that you do
11 so honestly and in good conscience.

12 Does that solve the problem that was a real problem?

13 **THE DEFENDANT:** I believe Your Honor referenced the
14 government proving its case. I would just remind the Court
15 that the plaintiff is not actually the Government and his
16 burden of proof is by a preponderance of the evidence and not
17 beyond a reasonable doubt. That's the only clarification that
18 we wish to --

19 **THE COURT:** You are right about that, and I'm reading
20 the official language of the Allen charge. Thank you.

21 **MR. HUBBARD:** You bet. Thank you, Your Honor.

22 **THE COURT:** What has been said has been modified and
23 I hope was understood by all of you. Thank you. Please go to
24 the jury room and try again.

25 (Jury out at 2:41 p.m.)

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1 **THE COURT:** I think one of these, one of these
2 charges that are fit for Allen charge usually is perhaps a
3 little bit more flexible than I think this one is, although
4 that's just my opinion.

5 And I suspect it may be a little harder to get them to
6 move off where they are right now, but I hope they can do it,
7 and thank you for your patience.

8 **MR. SCHNEIDER:** Your Honor, I'll talk to my clients
9 about a 7 and 1, accepting a 7 and 1. I don't know if they
10 will agree to it, but I'll discuss it and talk with plaintiff's
11 counsel as well.

12 **THE COURT:** I'm not sure what you just said, but
13 that's my fault.

14 **MR. SCHNEIDER:** Sure, Your Honor. I'm going to
15 discuss the possibility with my clients of accepting a 7 and 1
16 verdict as opposed to unanimous, and I'll discuss that with
17 plaintiff's counsel as well.

18 THE COURT: The Court is in recess. Stay close.

19 (Recess from 2:43 p.m. until 3:34 p.m.)

20 **THE CLERK:** Case Number 11-15876. Court is
21 reconvened in the matter of *Randle Griffin v Louis Condon*,
22 *et al.*

23 **THE COURT:** The Court understands that the parties
24 have agreed to a less-than-unanimous decision. How would that
25 be articulated by either or both sides?

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1 **MR. HUBBARD:** Your Honor, on behalf of the plaintiff,
2 Brandon Hubbard for the record. We are at this point
3 comfortable with a 7 and 1 verdict from the jury. If that does
4 not get it done, so to speak, the parties I think are willing
5 to revisit the issue of doing a 6 and 2, but we desire to do a
6 7 and 1 at the outset.

7 **THE COURT:** Is that true, Mr. Schneider?

8 **MR. SCHNEIDER:** Yes, Your Honor.

9 **THE COURT:** I don't know exactly how to say that to
10 the jury and get them to understand what you are doing and
11 where you are going, but why don't we bring them in and we'll
12 talk to them.

13 (Jury in at 3:36 p.m.)

14 **THE CLERK:** All rise for the jury.

15 **THE COURT:** Members of the jury, please be seated.

16 The parties have had an opportunity to examine the
17 situation and come to possible other conclusions or at least
18 one other conclusion. I don't know that this is, anything like
19 this has been said to you so far, but what we are ready to do
20 or the parties are ready to do is tell you if you can have
21 seven people voting one way even though there is one person
22 that isn't that that is satisfactory to the parties and they
23 will go on that basis.

24 Is there any reason to be hopeful about that?

25 **THE FOREPERSON:** Yes.

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1 **THE COURT:** There is? Why, unless you have a better
2 way to approach this, why don't you go back to the jury room
3 and see if you can put that in writing and come in with a
4 verdict.

5 Do you have something else?

6 **THE FOREPERSON:** No. At that point we can proceed.

7 **THE COURT:** Thank you.

8 (Jury out at 3:37 p.m.)

9 **THE COURT:** I'm not sure whether it makes any sense
10 for us to continue to keep the court in session, but you can
11 sit down anyway. It looked from the point of view of the
12 optimism, if that's what it is, of the foreperson that he would
13 be pretty much in the direction of saying if that's the way we
14 need to have it vote we'll have it vote that way and we'll have
15 a conclusion, and we'll have to see how they come out, but
16 anybody have any other ideas? I don't --

17 **MR. HUBBARD:** No further ideas, Your Honor, from the
18 plaintiff other than I will note for the Court that
19 irrespective of the outcome of the verdict we'll probably poll
20 the jury if Your Honor could --

21 **THE COURT:** We'll poll the jury, of course.

22 **MR. HUBBARD:** Certainly. Thank you, Judge.

23 **THE COURT:** Yes.

24 Court is in recess, and we'll let you know if there's any
25 reason not to be. The information coming from the jury room is

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1 that it isn't a walkaround, okay, you've got 7 and 1 and let's
2 fill the box in. They have got to do more than that, there's
3 more substance, which is just as well.

4 **MR. FINK:** Of course, Your Honor.

5 I said of course, Your Honor. We're here and ready
6 whenever we get any word. Thank you.

7 **MR. HUBBARD:** Thank you, Judge.

8 (Proceedings adjourned at 3:41 p.m.)

9 - - -

10

11 C E R T I F I C A T I O N

12 I certify that the foregoing is a correct transcription of
13 the record of proceedings in the above-entitled matter.

14

15 s/ Sheri K. Ward _____
16 Sheri K. Ward
Official Court Reporter

2/7/2017
Date

17 - - -

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